S. HRG. 108–596

EMPLOYEE FREE CHOICE ACT—UNION CERTIFICATION

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

SPECIAL HEARING

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EMPLOYEE FREE CHOICE ACT—UNION CERTIFICATION

FRIDAY, JULY 16, 2004

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Harrisburg, PA.

The subcommittee met at 2 p.m., in room 140, Pennsylvania State Capitol Building, Hon. Arlen Specter (chairman) presiding.

Present: Senator Arlen Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Good afternoon, ladies and gentlemen. The Appropriations Subcommittee on Labor, Health and Human Services and Education will now proceed. The purpose of this field hearing is to explore the provisions of S. 1925, which would establish a procedure for union certification where a majority of the employees of a firm have signed an authorization card.

This would make a change in the existing practice where there is a requirement for some 30 percent to have stated an interest in forming a union and after an investigation by the National Labor Relations Board there is a determination made as to whether that 30 percent is accurate and then there is a secret ballot to determine if there will be union representation.

There have been allegations and counterallegations that pressure is exerted on both sides, which impedes a democratic vote, with some saying that the employees are pressured by the employer not to go forward with the election and others saying that the employees are pressured by the unions to go forward.

This is a very fact-sensitive matter and it seemed that we ought to have a hearing on it to consider both sides. We have a very well balanced hearing this afternoon.

We're going to have the Deputy General Counsel of the National Labor Relations Board, Mr. John Higgins, who will be the first witness. The NLRB takes no position on legislation, as I understand from the preliminary statement of Mr. Higgins' proposed testimony, and he nods in the affirmative, because they feel it might impact on some of their decisions.

We're going to hear from Mr. Charles Cohen, who is a partner of Morgan, Lewis and Bockius law firm, representing the Chamber of Commerce, in opposition.

We're going to hear from Ms. Eileen Connelly, the executive director of the Pennsylvania State Council of Service Employees

International Union and vice-president of the Pennsylvania AFL–CIO, speaking in favor of the proposed legislation.

We're going to hear from Ms. Sarah Fox, attorney from Bredhoff and Kaiser law firm, representing the AFL–CIO, in favor of the bill.

Then we're going to hear from Mr. James Taubman, Staff Attorney for the National Right to Work Legal Defense Foundation, in opposition to the bill.

Then we're going to hear from three employees, Clarice Atherholt, Arlene Brockel, and Josephine Ruckinger, who will express their views as to what they have found.

In accordance with the Senate procedures, each witness is allotted 5 minutes. There is a clock on the witness table. It's green for four minutes, it turns to amber for a minute and then it turns to red. In light of the substantial number of witnesses, the subcommittee would appreciate if you observe the time limits, and there will be an opportunity to amplify views during the question-and-answer session which will follow.

So, with that, Mr. Higgins, we welcome you here and look forward to your testimony.

STATEMENT OF JOHN E. HIGGINS, JR., DEPUTY GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

Mr. HIGGINS. Thank you, Senator, and thank you for the invitation to appear before you today. First I'd ask that my written remarks be admitted into the record.

Senator SPECTER. Your full statement will be made a part of the record and without objection.

Mr. HIGGINS. Thank you. I appear before you today for the purpose of providing technical assistance or information about the National Labor Relations Act and its enforcement by the Office of General Counsel. As you indicated, the Board and the Office of General Counsel have a longstanding policy of not commenting on proposed amendments to the Act and my remarks will be consistent with that tradition.

I have been with the Board 40 years next month and it is because of this experience that, in response to your invitation, General Counsel Arthur Rosenfeld asked me to represent him here today to discuss the current state of the law.

Senator SPECTER. Sir, can you pull the microphone just a little closer. Senator Thurmond always used to say, pull the machine closer.

Mr. HIGGINS. Is that better? All right.

Senator SPECTER. You have a very deep South Carolina accent, so we can hardly understand you.

Mr. HIGGINS. Mine is a Boston accent.

Senator SPECTER. You got the machine closer. Senator Thurmond can hear you now.

Mr. HIGGINS. In General Counsel's role as a neutral prosecutor, he is statutorily separate and independent of the Board itself. So the views that I express today are not those of the Board. I am Mr. Rosenfeld's deputy and I've served in this position for three other General Counsels and for two acting General Counsels.

I can't really be exhaustive about this subject because we don't see every neutrality agreement. By their nature, they don't come before the Agency unless someone files a petition for an election or files an unfair labor practice charge.

The legislation you are considering proposes to supplement the procedures for Board certification of bargaining representatives by providing for card checks on a footing equal to those currently enjoyed by Board conducted secret ballot elections.

To say whether or not that's a good idea is not my purpose here today. That's a decision for Congress and certainly not for the NLRB. But I can say that with respect to the current certification procedures, they work quite well.

NLRB ELECTION IS CROWN JEWEL

The Board's election process has sometimes been called its crown jewel, and that I think is certainly well-deserved praise. Over the years we have run a lot of elections and we generally run them quickly, efficiently and fairly. The appellate procedures available to a party who is dissatisfied with an election can sometimes result in undue delay of the final resolution of the question concerning representation, but those delays are occasioned by the appeals process and not by Agency inaction.

To be sure, there are some cases that the Agency takes too long with, but that doesn't eclipse the outstanding record of our regional office staffs in seeing to it that our elections are run, for example, last year, in a median time of 40 days from the filing of the petition. And the statistics for the cases on the high side of that median are equally good, if not better. 92.5 percent of the elections run by the Board last year were run in 56 days or less.

As my written testimony indicates, we've had a number of cases involving neutrality agreements. As recently as yesterday, the General Counsel decided an unfair labor practice case that presented the issue of employee disaffection from the union contemporaneously with the union and the employer agreeing on recognition.

PREPARED STATEMENT

In many respects, this case is the unfair labor practice counterpart of the representation case now pending before the Board involving recognition bar, a case that's described more fully in my written remarks. The parties have not been notified of the General Counsel's decision, so I don't want to advise you of the results of that case or the case name, but I mention it only to emphasize the frequency with which we see these cases and the varying contexts in which they are presented.

So now I'll be willing to answer any questions you may have.

[The statement follows:]

PREPARED STATEMENT OF JOHN E. HIGGINS, JR.

I am pleased to appear before the Subcommittee today as it considers the issue of voluntary recognition of labor organizations by employers under the National Labor Relations Act. I am a 40-year career employee of the NLRB, currently serving for the second time as Deputy General Counsel. I had the honor of serving as a Member of the National Labor Relations Board under recess appointments by President Reagan and the first President Bush. I appreciate the opportunity, on behalf of NLRB General Counsel Arthur Rosenfeld, to explain the current status of the law

and to identify some of the legal issues that have arisen out of voluntary recognition pursuant to neutrality agreements.

At the outset I want to make clear, consistent with long standing policy at the NLRB, that the General Counsel, who is appointed by the president and confirmed by the Senate to be a neutral prosecutor under the National Labor Relations Act, does not comment on the merits of pending legislative proposals. We will, of course, do our best to enforce the law firmly and evenhandedly, if Congress sees fit to amend it. We have done so for 69 years and have enforced major as well as minor changes to the Act during that time.

The issue presented by the proposed legislation is voluntary recognition under the NLRA; a practice by which an employer accords to a labor organization the status of exclusive representative of employees in a bargaining unit on the basis of some verification that the labor organization has the support of a majority of the unit employees. Such verification can be by an independent neutral third party such as an arbitrator or a member of the clergy, or by the employer itself. Voluntary recognition—an alternative to the statutorily sanctioned process of Board-conducted, secret ballot elections—has been a common practice in labor-management relations for many years. Indeed, the Board has held that an employer that agrees to recognize a union upon a showing of majority support is bound by that commitment.[1]

The important thing about such voluntary recognitions under current labor law is that they are indeed voluntary. That is, as the law has stood for many years, the National Labor Relations Board cannot legally compel an employer, in the absence of an agreement otherwise, to recognize a labor organization, except under the representation provisions of the National Labor Relations Act. Those provisions, set out in Section 9 of the Act, require a secret ballot election, conducted by agents of the Board.

That right—to insist on a secret ballot election—is safeguarded to all employers under the Act. The Supreme Court made this clear in its Linden Lumber decision.[2] It is forfeited only if an employer commits such egregious unfair labor practices as to render the holding of a fair election impossible.[3]

An employer that receives a union demand for recognition has a choice as to whether to accede to the request based on a showing of majority, to tell the union to file a petition or to file the petition itself. In those situations in which a petition is filed, it is processed under the Act's representation procedures. Most of these cases, indeed over 85 percent of them, go to an election by means of a Stipulated Election Agreement. These agreements obviate the need for hearing and provide the most expeditious way of getting to an election. But, whether or not we have a hearing or a stipulated agreement, we run all elections within a 42 median day from the filing of the petition. Last year, for example, we ran 2,659 elections in a median time of 40 days. And, 92.5 percent of these elections were run within 56 days. This is quite a remarkable record and we are very proud of it. Our Regional Offices work very hard to get to Stipulated Election Agreements and they strongly encourage early election dates. Of course there are always cases where the process takes longer—in some cases, too long. These cases are however, as the statistics I just cited indicate, are the exception and not the rule.

Over the years employers have seen fit in some circumstances to forego their right to insist on a Board election and to simply recognize a union that claims and establishes majority support. Little controversy has attended this practice until recently. Rather, such recognitions have been challenged only occasionally—usually on the ground that they were "sweetheart" recognitions in which the favored union did not enjoy the support of a majority of the bargaining unit. Such illegitimate recognitions have routinely been challenged and condemned under Section 8(a)(2) of the Act, which outlaws improper "assistance" of a labor organization. The Office of the General Counsel has been diligent over the years in investigating and prosecuting such claims. Indeed, recognition of a minority union is one class of cases that readily lends itself to injunctive relief under Section 10(j) of the Act.

Recently, we have come to see a growing practice of "neutrality agreements" in which a union and an employer agree to ground rules that they will follow in the event that the union attempts organize the employer's employees. Under one form of these, a so-called "card check" agreement, the employer agrees to recognize the union on the basis of an independent verification of majority status. Card check agreements have become a matter of some controversy. Indeed, there are bills now pending in Congress that would effectively outlaw such agreements and require an NLRB election to establish a bargaining relationship. Similarly, other legislative

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[1] *See, e.g.,* Snow & Sons, 134 NLRB 709 (1961), enfd. 308 F.2d 687 (9th Cir. 1962).
[2] *Linden Lumber Div., Summer & Co.*, 419 U.S. 304 (1974).
[3] *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969).

proposals would sanctify "card checks" and elevate them to the status of a Board-conducted, secret ballot election, even in the absence of prior agreement by the employer.

One aspect of the General Counsel's role as prosecutor under the Act is to review and evaluate novel legal claims and to determine whether they warrant formal presentation to the five-Member Board in the form of an adversary legal proceeding. We have recently begun to see an uptick in cases that raise a number of novel legal issues growing out of voluntary recognition—both ad hoc recognition and recognition as a product of a neutrality agreement. In the time remaining I will briefly outline some of these.

One major class of cases we are seeing concerns whether terms contained in a neutrality agreement amount to unlawful assistance to the union in violation of § 8(a)(2) of the Act. In some of these cases, recognition has been granted pursuant to an agreement that is alleged to improperly favor the union by suggesting employer approval of the union and/or by not permitting the employees who oppose the union the same access to employees that the employer permits the union. In some cases the agreement is said to illegally promise or imply employment terms that would be implemented upon the employees' designation of the union as their representative. Such an agreement may run afoul of the Board's Majestic Weaving doctrine.[4]

Another significant group of cases concerns agreements between an employer and a union that are said to commit the employer to require entities that the employer is affiliated with or does business with to execute a neutrality agreement. It is alleged that such agreements are unlawful secondary agreements under Section 8(e) of the Act. Section 8(e) is the so-called "hot cargo" provision, which outlaws certain agreements between employers and labor organizations.

A third issue is that of the application of the recognition bar doctrine to cases in which an employer and union have agreed to voluntary recognition. The recognition bar doctrine precludes the running of an election for a reasonable time after an employer has voluntarily recognized the union on the basis of a showing of majority support.[5] This policy bars election petitions by a group of employees seeking to decertify the union as bargaining agent or by a rival union, seeking to replace the new incumbent. The Board is now considering the viability of the recognition bar doctrine and just how far it should extend.[6] Briefs were solicited from any interested parties last month and the General Counsel has filed a brief suggesting that while recognition bar serves a valuable statutory purpose, it should not preclude giving employees an opportunity for a secret-ballot election where within 30 days of a recognition, at least 50 percent of the unit employees express opposition to that recognition and file a petition for an election with the Board. Briefs were filed yesterday.

These are some of the issues with which the Board and the General Counsel are now grappling. They are complex and require careful investigation and consideration. Our Regional Offices have recently been directed to submit neutrality agreement unfair labor practice cases to our Division of Advice in Washington, so that they may receive expert legal review before any prosecutorial decisions are made. The General Counsel wants to assure that the theories being advanced in these cases are consistent and uniform.

Again thank you for the opportunity to appear before you today. I would be happy to answer any questions you may have.

Senator SPECTER. Thank you, Mr. Higgins. I note your comment that 90 percent of all elections are conducted in 56 days of filing a petition. What is the longest one that you had heard last year?

Mr. HIGGINS. I don't know, Senator. I don't know what that one was. There are some cases that are pending before the Board involving preelection issues that have been pending before the Board for more than a year.

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[4] *Majestic Weaving Co.*, 147 NLRB 859, (1964), enf. denied on other grounds 355 F.3d 854 (2d Cir. 1966) (employer violates Section 8(a)(2) when it recognizes and negotiates a contract with a union that does not have authorization from a majority of the employer's employees to represent the employees in collective bargaining, even when the recognition and contract are conditioned upon the Union's future demonstration of majority support).

[5] *See, e.g., Keller Plastics Eastern*, 157 NLRB 583 (1966).

[6] *Dana Corp.*, 341 NLRB No. 150 (2004).

Senator SPECTER. Well, are some still pending for more than a year?

Mr. HIGGINS. Yes, sir. But it's a handful compared to the 4,600 petitions we received last year.

Senator SPECTER. And the average time on appeal to the NLRB in Washington is 473 days; is that accurate?

Mr. HIGGINS. I think that is, but, again, that's a handful of cases, that's an average, which is distorted by a particularly long case. There are cases pending at the Board for a long period of time and one of the goals of the current Board is to get rid of this backlog. The Board has been plagued, as you know, for a number of years now with a problem with turnover among the Board members, recess appointments, Board members coming and going.

Senator SPECTER. Is that figure accurate, though, if you know?

Mr. HIGGINS. I'd have to check on that, Senator. I'd be more than happy to do that and submit it for the record.

Senator SPECTER. Well, 473 days is a little long for an appellate process, more than a year, wouldn't you say?

Mr. HIGGINS. Yes, sir.

Senator SPECTER. There have been efforts made to very materially cut back on NLRB funding. When I took over as Chairman of this Subcommittee, there was an effort in the House of Representatives to cut the funding by some 30 percent and that was altered in the Senate. We not only eliminated that cut but gave the appropriate inflation relief. Do you consider the funding for the NLRB to be adequate today to enable the NLRB to do its job?

Mr. HIGGINS. Yes. And, of course, we support the President's budget request.

Senator SPECTER. You are not disagreeing with the President?

Mr. HIGGINS. No, sir.

Senator SPECTER. I'm not surprised.

Well, that's something which comes up constantly for those who are attending the hearing. Some of the Federal agencies think that budgets are too sparse. I haven't found one yet in my 24 years that said they think they're overfinanced, but even when an agency may think they need more money, they don't say so. They have a rigorous line of review through the Office of Management and Budget and it's expected they're good soldiers. When the administration says that's that, they don't say the budget is insufficient.

Every now and then we meet someone in the corridor who tells us a different story. I'm not saying NLRB has done that, but we watch your budget and when we find that the time is long—and I think these time limits are really on the outer limit, I think they are too long—then we, as a matter of congressional oversight, put in more funding to try to get matters expedited.

We find veterans' appeals, for example, are much, much too long. Social security appeals are much, much too long. And it is very important to get a very prompt disposition of these matters in controversy, because people are waiting. It's like the court system, where we just opened up the station in Reading where we have a Federal station, two new judges. Judge Stengel from Lancaster and Judge Sanchez from Chester County are sitting there.

So we would keep a close eye on it. And if there's any suggestion that anybody from the Board wants to bring to this subcommittee,

we're in charge of the appropriations, we'd be very interested to hear it.

Mr. HIGGINS. We appreciate it. As you correctly note, this Committee has been very supportive of the Board's budget requests in the past, particularly in the past 2 or 3 years, and we have used that additional money to remove some of the backlog, particularly the backlog in the field.

The problem with the cases that you are speaking of, of course, are at the Board, and that's where the problem with Board member turnover has plagued the Board with getting some of cases out.

Senator SPECTER. This subcommittee has been very supportive of the Board, because you perform a very important function. And when you don't make a decision, a lot of people out there are hanging in limbo. And that's our job to see to it that you have funding to carry out a very important process.

Mr. HIGGINS. Again, we're very appreciative, Senator.

Senator SPECTER. Mr. Higgins, is there currently consideration by the Board to alter the practice where the employees and the employer agree to have a card certification, as an alternative to holding an election?

Mr. HIGGINS. Well, before the Board now is a case involving the viability of the recognition bar doctrine, the question being whether or not a recognition extended between an employer and a union bars a decertification petition filed by a group of employees who don't want the union and whether it will bar a petition for more than a reasonable period of time.

That case is before the Board. As a matter of fact, I described that case in my written remarks and also described the general counsel's brief on that question that was filed yesterday in that case.

In addition to that, there are a number of unfair labor practice cases currently pending before the General Counsel. None of them actually go specifically to challenging the concept of neutrality agreements qua neutrality agreements.

There are allegations that some recognitions were extended in the context of coercive conduct either by the employer or the union. There are allegations that particular neutrality agreements may violate section 8(e) of the Act. And those are all pending decision by the General Counsel as we speak. In fact, in a number of them we've had the parties in, the employer, the union, and the charging party, the Right to Work people.

Senator SPECTER. Mr. Higgins, isn't it correct that under current law if employees and the employer agree to have the so-called card count that that can be done?

Mr. HIGGINS. Yes, sir, that is correct. And under current law, the Board will require the employer and the union to honor the results of that, absent showing that the cards were obtained coercively or that the cards don't truly reflect the union's majority status.

Senator SPECTER. If there is some irregularity, of course, you don't have to recognize the result, but if it's a regular procedure and a majority of the employees sign the cards, as long as there's an agreement between the employees and the employer, that is an alternative way under existing law for union certification?

Mr. HIGGINS. That is correct, sir for recognition. And that's what's called the Snow & Sons doctrine, which comes out of a case called Snow & Sons.

Senator SPECTER. Now, is there any active consideration by the NLRB to change that procedure?

Mr. HIGGINS. Again, I don't know of any case now in which there's an unfair labor practice charge that specifically challenges the legality of a card check.

Senator SPECTER. Well, if there's an unfair labor practice, that could result in setting it aside on factual grounds. My question goes to a different point, as to whether there is any consideration now by the National Labor Relations Board to alter the existing procedure where an employer and employees agree to card certification.

Mr. HIGGINS. Yes, there is. Well, to the extent that recognition bar case that I described a moment ago is an attempt to alter the procedure, that is one matter that's pending before the Board now that's under consideration.

What that could do would be to alter the bar status of a recognition agreement. And when I say bar, I mean barring a decertification petition or decertification election.

Senator SPECTER. Are you saying that there's a matter pending now which could eliminate this certification by cards where there is agreement between the employer and employees——

Mr. HIGGINS. No, sir, it wouldn't eliminate it.

Senator SPECTER. Let me finish the question. We can't tell anything about your answer unless we finish the question.

Is there anything pending before the NLRB now which would alter certification where the employer and employees agree that it will be done by the card certification?

Mr. HIGGINS. Yes, sir. This would alter it only to the extent that it would permit employees who are unhappy with an agreement and with a recognition under one of those agreements to come in and ask the Board to run an election. Today they cannot come in and ask the Board to run such an election, because of what is called the recognition bar doctrine.

There is a case pending before the Board right now in which the Board has asked the parties to brief the question of whether or not that recognition bar doctrine should continue in existence in the face of a recognition agreement of the kind you described.

Senator SPECTER. Well, so, in effect, you're saying that the Board is considering changing the procedure?

Mr. HIGGINS. Yes, sir, that is correct. I'm sorry. The proposal does not propose to outlaw recognition agreements. It would only remove the bar quality, and that's a term, bar meaning it would remove the recognition as a bar to a decertification election petition filed by unhappy employees.

Senator SPECTER. So it would be only in the case of a decertification decision?

Mr. HIGGINS. Yes, sir.

Senator SPECTER. But otherwise, the current rule would stay the same?

Mr. HIGGINS. Yes, sir.

Senator SPECTER. Okay. Thank you very much, Mr. Higgins, we appreciate your coming to the field hearing and thank you very much for your testimony.

Mr. HIGGINS. Thank you.

Senator SPECTER. We'll now call our second panel, Mr. Charles Cohen, Ms. Eileen Connelly, Ms. Sarah Fox, and Mr. Glenn Taubman. Thank you all for joining us.

Mr. Charles Cohen is a partner with the labor and employment practice of Morgan, Lewis and Bockius, testifying today on behalf of the United States Chamber of Commerce. From 1994 to 1996, he served as a member of the NLRB, graduate of Tulane University and a law degree from the University of Pittsburgh School of Law.

Thank you for joining us, Mr. Cohen, and my first question is, when did Morgan, Lewis and Bockius become Morgan Lewis?

Mr. COHEN. Well, the name of the firm is still Morgan, Lewis and Bockius, but we go by Morgan Lewis for about the last 4 years.

Senator SPECTER. This is an esoteric question which lawyers who have practiced in Philadelphia for a long time are interested in and they're condensing all their names. Mr. Cohen, you have 5 minutes. You may proceed.

STATEMENT OF CHARLES I. COHEN, ESQUIRE, PARTNER, MORGAN LEWIS, TESTIFYING ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. COHEN. Thank you, Senator. I am pleased and honored to be here today and I also ask that my written remarks be admitted into the record.

Senator SPECTER. Everybody's written remarks will be made, without objection, a part of the record in full and then that gives you an opportunity to summarize within the allotted 5 minutes.

Mr. COHEN. Thank you, Senator. Before becoming a member of the Board, I worked for the NLRB in various capacities from 1971 to 1979, and then as a labor lawyer representing management in private practice until serving on the Board and then in private practice for the past 8 years.

In my 33 years of experience, I've had the opportunity from different vantage points to observe and understand the issues which go to the heart of the proposed legislation. It is my sincere belief that Senator Wagner and the Congress got it right in 1935 by providing for government supervised NLRB elections and that Congress again got it right in 1947 by providing for employer free speech, subject to the restriction that that speech not contain promises of benefit or threats of reprisal.

You will hear situations where the system did not work. Undoubtedly, that occurs. But, in my view, those situations are not as pervasive as portrayed. Indeed, it is not those situations which give rise to the decline in union density. Rather, that trend transcends NLRA law and has come about largely from the pressures of public competitive global economy, the wealth of employee protective legislation enacted over the past 40 years and societal changes regarding group affiliations.

The heart of the proposed legislation, turning the NLRB into a card-counting mechanism rather than the guarantor of industrial democracy is a quite radical notion. Rather than being a 21st century idea in response to a 21st century problem, the idea of card

check recognition in lieu of a secret ballot election was on the union wish list at the time the so-called Labor Law Reform Bill was considered under the Carter administration.

The same concerns were expressed about inadequacies of the NLRA and rising virulence of employers in their anti-union campaigns. But card check recognition was determined to be too extreme for passage. Hence, the notion of extremely quick secret ballot elections was substituted in that proposed legislation.

I submit that if ever there were a time for card check recognition rather than secret ballot elections——

Senator SPECTER. There was a change from card check to secret ballot in the legislation?

Mr. COHEN. In proposed legislation under the Carter administration, legislation which never got enacted. I submit that if ever there were a time for card check recognition rather than secret ballot elections, the present is the least appropriate time.

PREPARED STATEMENT

With vastly increased use of neutrality agreements providing, in effect, a gag order on employers, employees need to know not only the potential benefits but the pitfalls of unionization. By coupling card check recognition with neutrality agreements, employee knowledge is foreclosed.

In addition, it needs to be recognized that neutrality agreements are not, in my experience, the product of employee desires. Rather, they come from leverage that unions exert over the employer with respect to already recognized employees and/or from governmental or regulatory pressures.

I thank you for the opportunity to be here.

[The statement follows:]

PREPARED STATEMENT OF CHARLES I. COHEN

Chairman Specter and Members of the Subcommittee, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, I was appointed by President Clinton, confirmed by the Senate, and served as a Member of the National Labor Relations Board from March 1994 until my term expired in August 1996. Before becoming a Member of the Board, I worked for the NLRB in various capacities from 1971 to 1979 and as a labor lawyer representing management in private practice from 1979 to 1994. Since leaving the Board in 1996, I have returned to private practice and am a Senior Partner in the law firm of Morgan, Lewis & Bockius LLP. I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce, and Chair of its NLRB subcommittee, and am testifying today on behalf of the U.S. Chamber of Commerce.

The National Labor Relations Act was enacted in 1935 and has been substantially amended only twice—once in 1947 and once in 1959. The Act establishes a system of industrial democracy which is similar in many respects to our system of political democracy. At the heart of the Act is the secret ballot election process administered by the National Labor Relations Board. In order to understand how recent trends in organizing are diluting this central feature of the Act, some background is necessary.

THE NLRB'S SECRET BALLOT ELECTION PROCESS

If a group of employees in an appropriate collective bargaining unit wish to select a union to represent them, the Board will hold a secret ballot election based on a petition supported by at least thirty percent of employees in the unit. The Board administers the election by bringing portable voting booths, ballots, and a ballot box to the workplace. The election process occurs outside the presence of any supervisors or managerial representatives of the employer. No campaigning of any kind may occur in the voting area. The only people who are allowed in the voting area are

the NLRB agent, the employees who are voting, and certain designated employee observers.

The ultimate question of union representation is determined by majority rule, based on the number of valid votes cast rather than the number of employees in the unit. If a majority of votes are cast in favor of the union, the Board will certify the union as the exclusive bargaining representative of all employees in the collective bargaining unit. Once a union is certified by the Board, it becomes the exclusive representative of all of the unit employees, whether or not they voted for the union. The employer is obligated to bargain with the union in good faith with respect to all matters relating to wages, hours, and working conditions of the bargaining unit employees.

The Board is empowered to prosecute employers who engage in conduct that interferes with employee free choice in the election process, and may order a new election if such employer interference with the election process has occurred. The Board will also order the employer to remedy such unfair labor practices, for example by ordering the employer to reinstate and compensate an employee who was unlawfully discharged during the election campaign. In extreme cases, the Board may even order an employer to bargain with the union without a new election, if the Board finds that its traditional remedies would not be sufficient to ensure a fair rerun election and if there is a showing that a majority of employees at one point desired union representation. The Supreme Court affirmed the Board's power to issue this extraordinary remedy in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). When issuing a Gissel bargaining order, the Board will determine whether majority support for the union existed by checking authorization cards signed by employees during the organizing process.

As the Board and the Supreme Court have acknowledged, the use of authorization cards to determine majority support is the method of last resort. A secret ballot election is the "most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Gissel Packing*, 395 U.S. at 602. Unions likewise prefer an NLRB secret ballot election, at least when they are faced with a potential loss of majority support. In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the United Food and Commercial Workers, supported by the AFL–CIO as amicus curiae, took the position that "Board elections are the *preferred means* of establishing whether a union has the support of a majority of the employees in a bargaining unit." *Id*. at 719 (emphasis added). The Board agreed with the unions' position in *Levitz*. *See id*. at 725 ("We agree with the General Counsel and the unions that Board elections are the preferred means of testing employees' support.").

Although authorization cards may adequately reflect employee sentiment when the election process has been impeded, the Board and the Court in *Gissel* recognized that cards are "admittedly inferior to the election process." *Gissel Packing*, 395 U.S. at 602. Other federal courts of appeal have expressed the same view:

—"[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer." *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).

—"It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a card check, unless it were an employer's request for an open show of hands. The one is no more reliable than the other. . . . Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing." *NLRB* v. *S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967).

—"The conflicting testimony in this case demonstrates that authorization cards are often a hazardous basis upon which to ground a union majority." *J.P. Stevens & Co.* v. *NLRB*, 441 F.2d 514, 522 (5th Cir. 1971).

—"An election is the preferred method of determining the choice by employees of a collective bargaining representative." *United Services for the Handicapped* v. *NLRB*, 678 F.2d 661, 664 (6th Cir. 1982).

—"Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)." *NLRB* v. *Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

—"Freedom of choice is 'a matter at the very center of our national labor relations policy,' . . . and a secret election is the preferred method of gauging choice." *Avecor, Inc.* v. *NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991) (citations omitted).

Having recognized in Gissel that a secret ballot election is the superior method for determining whether a union has majority support, the Supreme Court in *Linden Lumber* v. *NLRB*, 419 U.S. 301 (1974), held that an employer may lawfully refuse to recognize a union based on authorization cards and insist on a Board-supervised secret ballot election. The only exceptions to an employer's right to insist on an election are when the employer, as in the *Gissel* situation, has engaged in unfair labor practices which impair the electoral process or when the employer has agreed to recognize the union based on a check of authorization cards. Thus, an employer can agree to forgo a secret ballot election and abide by the less reliable card check method of determining union representation.

THE INCREASING USE OF NEUTRALITY/CARD CHECK AGREEMENTS IN ORGANIZING CAMPAIGNS

One of the highest priorities of unions today is to obtain agreements from employers which would allow the union to become the exclusive bargaining representative of a group of employees without ever seeking an NLRB-supervised election. These agreements, which are often referred to as "neutrality" or "card check" agreements, come in a variety of forms. In some cases, the agreement simply calls for the employer to recognize the union if it produces signed authorization cards from a majority of employees. In many cases, the agreement includes other provisions which are designed to facilitate the union's organizing campaign, such as:

—An agreement to provide the union with a list of the names and addresses of employees in the agreed-upon unit;

—An agreement to allow the union access to the employer's facilities to distribute literature and meet with employees;

—Limitations or a "gag order" on employer communications to employees about the union;

—An agreement to start contract negotiations for the newly-organized unit within a specified (and short) time frame, and to submit open issues to binding interest arbitration if no agreement is reached within that time frame; and

—An agreement to extend coverage of the neutrality/card check agreement to companies affiliated with the employer.

Whatever form the agreement may take, the basic goal is the same: to establish a procedure that allows the union to be recognized without the involvement or sanction of the National Labor Relations Board. Neutrality and card check agreements therefore present a direct threat to the jurisdiction of the Board and its crown jewel, the secret ballot election process. I have written two law review articles discussing this trend. *See* Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, The Labor Lawyer (Fall, 2000); Charles I. Cohen and Jonathan C. Fritts, *The Developing Law of Neutrality Agreements*, Labor Law Journal (Winter, 2003).

The motivating force behind neutrality/card check agreements is the steady decline in union membership among the private sector workforce in the United States. Unions today represent only about 8 percent of the private sector workforce, about half of the rate 20 years ago. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Union Members in 2003* (Jan. 21, 2004), available at http://www.bls.gov/news.release/pdf/union2.pdf. There are many explanations for this precipitous decline: the globalization of the economy and the intense competition that comes with it, the increasing regulation of the workplace through federal legislation rather than collective bargaining, and the changing culture of the American workplace. While unions may not disagree with these explanations to varying degrees, they claim that the NLRB's election process is also to blame. Unions argue that the NLRB's election process is slow and ineffective, and therefore an alternative process is needed—namely, neutrality/card check agreements.

I believe there are two basic problems with this argument. First, it is not supported by the facts. The NLRB's election process is efficient and fair, as demonstrated by hard statistics. Second, neutrality/card check agreements limit employee free choice and are generally the product of damaging leverage exerted by the union against the employer.

THE NLRB'S ELECTION PROCESS IS EFFICIENT AND FAIR

The standard union criticisms of the NLRB's election process are more rhetorical than factual. Unions argue that the NLRB's election process is slow and allows employers to exert undue influence over employees during the pre-election period. Both of these arguments are not supported by the facts.

The NLRB's election process is not slow. In fiscal year 2003, 92.5 percent of all initial representation elections were conducted within 56 days of the filing of the

petition. *Memorandum GC–04–01, Summary of Operations (fiscal year 2003)*, at p. 5 (December 5, 2003), available at http://www.nlrb.gov/nlrb/shared_files/gcmemo/gcmemo/gc0401.pdf?useShared=/nlrb/about/reports/gcmemo/default.asp. During that same time period, the median time to proceed to an election from the filing of a petition was 40 days. *Id*. Based on my experience over the past 30 years, these statistics demonstrate that the Board's election process has become even more efficient over time.

Unions are currently winning over 50 percent of NLRB secret ballot elections involving new organizing. This is the category of elections that unions are seeking to replace with neutrality/card check agreements, and it is also the same category of elections that would be replaced by the Miller-Kennedy bill. If anything, unions' win rate in representation elections is on the rise. The NLRB's most recent election report shows that unions won 58.9 percent of all elections involving new organizing. *See NLRB Election Report; 6-Months Summary—April 2003 through September 2003 and Cases Closed September 2003*, at p. 19 (March 26, 2004). This figure is about the same as it was 40 years ago. In 1965, unions won 61.8 percent of elections in RC cases (cases which typically involve initial organizing efforts, as opposed to decertification elections or employer petitions). See Thirtieth Annual Report of the National Labor Relations Board, at p. 198 (1965). After 1965, unions' election win rate declined before rising back to the level where it is today:

—In 1975, unions won 50.4 percent of elections in RC cases. See Fortieth Annual Report of the National Labor Relations Board, at p. 233 (1975).

—In 1985, unions won 48 percent of elections in RC cases. See Fiftieth Annual Report of the National Labor Relations Board, at p. 176 (1985).

—In 1995, unions won 50.9 percent of elections in RC cases. See Sixtieth Annual Report of the National Labor Relations Board, at p. 153 (1995).

These statistics undermine any argument that the NLRB's election process unduly favors employers, or that the recent decline in union membership among the private sector workforce is attributable to inherent flaws the NLRB's election process. Unions are winning NLRB elections at the same or higher rate now than they have in almost 40 years. To be sure, there are "horror stories" of employers who abuse the system and commit egregious unfair labor practices in order to prevail in an election. In such cases, the law provides remedies for the employer's unlawful behavior, including Gissel bargaining orders. But these situations are the exception rather than the norm. In the overwhelming majority of cases where employees choose not to be represented by a union, they do so based on the information that is presented by both sides during the campaign process.

Unions attempt to portray the Board's secret ballot election process as fundamentally unfair (except when unions are faced with a challenge to their majority status) by making unfavorable comparisons between Board elections and a typical political election in the United States. In doing so, unions frequently ignore several important facts about the NLRB election process:

—The union controls whether and when an election petition will be filed. Imagine if the challenger in a political election controlled the timing of the election.

—The union largely controls the definition of the bargaining unit in which the election will occur, because the union need only demonstrate that the petitioned-for unit is an appropriate bargaining unit. Imagine if the challenger in a political election had almost irreversible discretion to gerrymander the voting district to its maximum advantage.

—The union usually has obtained signed authorization cards from a majority of employees at the time the petition is filed. Thus, the union already knows the voters and has conducted a straw poll before the employer is even aware that an election will be held. Imagine if the challenger in a political election could campaign and poll the electorate without the incumbent's knowledge, wait until the polls show that the challenger has majority support, and then give the incumbent less than 60 days' notice of the election.

—Even though the union already knows the voters well by the time the election petition is filed, the employer must give the union a list of all of the voters' names and home addresses after the petition is filed. The union, but not the employer, is then permitted to visit the employees at home to campaign for their vote.

—The union, unlike the employer, can make campaign promises to the employees to induce them to vote for the union.

—The union, like the employer, may designate an observer to be present in the voting area for the duration of the election, in order to check every voter and make sure that no irregularities occur.

These facts illustrate that, far from being unfair to unions, the NLRB's election process offers unions many unique advantages.

PROBLEMS WITH NEUTRALITY/CARD CHECK AGREEMENTS

The fundamental right protected by the National Labor Relations Act is the right of employees to choose freely whether to be represented by a union. 29 U.S.C. § 157. Neutrality/card check agreements limit employee free choice by restraining employer free speech. Section 8(c) of the Act protects the right of employers to engage in free speech concerning union representation, as long as the employer's speech does not contain a threat of reprisal or a promise of benefit. 29 U.S.C. § 158(c). Unions, through neutrality/card check agreements, seek to restrain lawful employer speech by prohibiting the employer from providing employees with any information that is unfavorable to the union during the organizing campaign. Such restrictions or "gag orders" on lawful employer speech limit employee free choice by limiting the information upon which employees make their decision.

A second problem with neutrality/card check agreements is the method by which they are negotiated. In my experience, neutrality/card check agreements are almost always the product of external leverage by unions, rather than an internal groundswell from unrepresented employees. The leverage applied by the union can come from a variety of sources. In many cases, the union has leverage because it represents employees at some of the employer's locations. The union may be able to use leverage it has in negotiations for employees in an existing bargaining unit, in order to win a neutrality/card check agreement that will facilitate organizing at other locations. Bargaining over a neutrality/card check agreement, however, has little or nothing to do with the employees in the existing bargaining unit, and it detracts from the negotiation of the core issues at hand—wages, hours, and working conditions for the employees the union already represents.

In other cases, the union exerts pressure on the employer through political or regulatory channels. For example, if the employer needs regulatory approval in order to begin operating at a certain location, the union may use its political influence to force the employer to enter into a neutrality/card check agreement for employees who will be working at that location. Political or regulatory pressure may be coupled with other forms of public relations pressure in order to exert additional leverage on the employer. In general, this combination of political, regulatory, public relations and other forms of non-conventional pressure has become known as a "corporate campaign," and it is this type of conduct—rather than employee free choice—that has produced these agreements.

Thus, when a union succeeds in obtaining a neutrality/card check agreement, it generally does so by exerting pressure on the company through forces beyond the group of employees sought to be organized. The pressure comes from bargaining units at other locations, and/or it comes from politicians, regulators, customers, investors, and the public at large. It is a strategy of "bargaining to organize," meaning that the target of the campaign is the employer rather than the employees the union is seeking to organize.

The strategy of "bargaining to organize" stands in stark contrast to the model of organizing under the National Labor Relations Act. Under the Act, the pressure to organize comes from within—it starts with the employees themselves. If a sufficient number of employees (30 percent) desire union representation, they may petition the NLRB to hold a secret ballot election. If a majority vote in favor of union representation, the NLRB certifies the union as the employees' exclusive representative and the collective bargaining process begins at that point. At all times, the focus is on the employees, rather than on the employer or the union.

There is no cause for abandoning the secret ballot election process which the Board has administered for 7 decades. The Act's system of industrial democracy has withstood the test of time because its focus is on the true beneficiaries of the Act—the employees. In my view, the Miller-Kennedy bill is not sound public policy because it would deprive employees of the fundamental right to determine the important question of union representation by casting their vote in a Board-supervised secret ballot election. Indeed, that it would be unwise public policy to abandon government-supervised secret ballot elections in favor of mandatory card check appears to me to be a self-evident proposition. It likewise would eviscerate the proud tradition of industrial democracy that has been the hallmark of the NLRB for nearly seven decades.

I am aware that Senator Lindsey Graham (R-SC) has introduced quite opposite legislation, S. 2637, which would require that union representation for currently unrepresented groups of employees be determined by a secret ballot election. Without the increasing use of corporate campaigns and neutrality/card check agreements over the last decade—a trend that has eroded employee free choice and reflects a shift in focus from organizing employees to organizing employers—such legislation would not be needed. But, in light of this trend, such legislation, in my view, is nec-

essary to protect the interests of the employees the Act is intended to benefit, by ensuring that their right to vote is not compromised by agreements that are the product of external pressure on their employer.

THE MILLER-KENNEDY BILL'S INTEREST ARBITRATION PROVISIONS

In addition to mandating recognition by card check rather than a secret ballot election, the Miller-Kennedy bill would eviscerate another fundamental tenet of U.S. labor law: voluntary agreement. As the Supreme Court held in *H.K. Porter* v. *NLRB*, 397 U.S. 99 (1970), the Act is founded on the notion that the parties, not the government, should determine the applicable terms and conditions of employment:

"The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employer and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. *But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.*"——*Id.* at 103–04 (emphasis added).

The Miller-Kennedy bill would destroy this bedrock principle of the Act by mandating that, if the parties are not able to reach agreement on a first contract within a 120-day period, the terms of the contract will be set by an arbitration panel designated by the Federal Mediation and Conciliation Service. As with the abandonment of the secret ballot election, I believe this interest arbitration requirement is unwise public policy. The employer is the entity which must run the business, remain competitive, and pay the employees each week. The union has the opportunity to influence the employer's thinking by engaging in economic warfare. But, the actual agreement is forged in the crucible of what the business can sustain. I firmly believe that our present system has it right for employers and employees covered by the NLRA and that the employer must retain the power to determine whether the terms of the agreement are acceptable to it.

CONCLUSION

This concludes my prepared oral testimony. I look forward to discussing my comments in more detail during the question and answer period, but before that, I would again like to thank the Subcommittee for inviting me here today, and for its attention to these very important developments regarding labor law in the 21st century.

Senator SPECTER. Thank you very much, Mr. Cohen. I would turn now to Ms. Eileen Connelly, the executive director of the Pennsylvania State Council of Service Employees International Union and vice-president of the Pennsylvania AFL–CIO. Prior to her union work, she was a medical laboratory technician at the Hazleton-St. Joseph Hospital in Hazleton.

Thank you very much for joining us, Ms. Connelly, and we look forward to your testimony.

STATEMENT OF EILEEN CONNELLY, EXECUTIVE DIRECTOR, SERVICE EMPLOYEES INTERNATIONAL UNION, AND VICE PRESIDENT, PENNSYLVANIA AFL–CIO

Ms. CONNELLY. Hi, Senator. First let me extend my condolences to you and your staff on the death of Carry Lackman. I also want to welcome all the union members in the room. There's quite a few here. And I'm proud to be testifying on behalf of SEIU and the AFL–CIO here.

I think that you know that SEIU represents about 60,000 people in the State of Pennsylvania, and just from the first two witnesses I guess only SEIU'S having all the problems, but we have seen a lot with regard to organizing.

My personal experience, doing this over 20 years, I've been organizing thousands and thousands of workers into unions in the State of Pennsylvania, and I've witnessed way too much abuse, way too much intimidation and harassment by employers. And all of my organizing has been in health care. I think that's important to point out. I have not organized workers in other industries.

I've seen employers manipulate the NLRB process in such a way as to turn the concept of democracy on its head. Employers, their attorneys, their consultants, they're all experts at playing the legal system, and they discourage, they frustrate, they stall, they do everything possible to keep workers from organizing. They spend hundreds of thousands of dollars, a lot of which is health care dollars that should be spent on patient care in the health care system.

I did want to share, and it's in my written remarks, but I did want to share a few specific examples, because I think that they point out exactly what we go through in organizing, and they're not in any way the exception with regard to my experience in organizing.

There's a group of workers in Pittsburgh, and this happened very recently, they're very poor workers they work for a for-profit company. They signed up over 70 percent on union cards. They followed the current Board procedure, they filed for an election, and instead of voluntarily agreeing to an election the employer claimed that all the LPNs and the lead cook were supervisors.

They went through days of hearings, they filed briefs. Months later, not 56 days, months later they still didn't have an election in sight. But the Labor Board found in favor of the union and found that they had to go to an election. But through that period, you'd think, well, the employer lost the case. No. Through that period, they never expected to win the issue, but they just wanted to delay long enough to intimidate, harass and scare the workers there.

The message was simple in this campaign. We're the boss, we decide whether or not you have a job and we're totally committed to stopping you from organizing, and that's what they did. We were not able to maintain that campaign. We just recently pulled out of the election, because we lost a majority of the support, from 70 percent a few months later to probably down to around 30 percent, and we didn't go through with the election.

Even workers who overcome these, they often have their decision nullified. One of the employee witnesses here today from SEIU will testify specifically to what she experienced at the Presbyterian Home in Hollidaysburg, where 2 years later—they waited a year for the ballots to be counted following their election. They waited 1 year to get a first contract, still don't have a first contract. And right now the employees are waiting to have a decertification election after 2 years from the day that they filed for their election.

Some of what I heard earlier from the Labor Board with regard to the exception rather than the rule, I see that as the rule in terms of very, very long delays, very, very long processes.

The other thing that employers do very typically is they hire what we call outside union busters, they call them attorneys, we call them union busters, and they train supervisors. We've seen here in Pennsylvania numerous times people actually go in and live

at the facility day and night weeks before an election to have one-on-one meetings, we call them captive audience meetings, or one-on-one literally where it's the consultant and the employee sitting and the consultant is telling the employee things like, well, you don't know if you're going to have a job or you don't know if you're going to keep what you have.

These companies oftentimes cost hundreds of thousands of dollars. We've seen it in hospitals here in Pennsylvania. A few years ago the State auditor general actually found Geisinger up in Danville, the hospital in Wilkes-Barre that we organized that they illegally used Medicare money to—actually, Medicaid money it was—to fight the union in an organizing campaign. Nothing happened, absolutely no penalty to the employer for that.

So what happens is that the employer, not the union, has control over the employees in the workplace. So when you're going through an organizing campaign, the employees are really not in a free and democratic position with regard to going through that campaign.

Senator SPECTER. Who was the employer in that case, Ms. Connelly?

Ms. CONNELLY. Geisinger Medical Center in Wilkes-Barre. Geisinger, the main Geisinger is in Danville, Pennsylvania. This hospital was part of the Geisinger System in Wilkes-Barre that SEIU was organizing.

The Employee Free Choice Act is meant to avoid all of this, to not allow the employer to be able to go through all this. Under current laws, it is legal for a group of workers who have a majority of support for the employer to recognize the union. It doesn't happen that way.

We have experience after experience after experience where we file for an election, we wait 56 days, we wait months and months before we actually get a date for an election, and then with legal filings going through what goes on in D.C. where—I mean I've seen it over and over and over again where people have to wait 1 year from a filing in D.C. until they get a date for an election. It is, in my experience, not the exception at all. It's absolutely the rule.

You know, one thing—I'm running out of time, but one thing I do think it's important to think about with regard to this piece of legislation and within the context of how people vote in this country, the workplace, as I said before, is not democratic at all. In this country, if we were put in a situation like happens with union elections where only one candidate had access to the population and another candidate, for instance, had to try to talk to the population that was going to vote for them from another State, then we would say, well, that's not fair that we do that. But, in reality, that's what happens in the workplace. The union doesn't have access to talk to employees. We are not allowed inside the workplace. The employer has them every day, every minute that they're at work. So if you think about it within the context of an election for Senator, you know, it's like you would have to talk to your constituents from New Jersey, because you're not allowed——

Senator SPECTER. Be careful, Ms. Connelly. When he is in New Jersey, Senator Lautenberg is not here.

Ms. CONNELLY. Actually, I'm a Jersey girl born and raised, so I can talk about Jersey. And I still have a lot of people who vote in Jersey in my family.

But in all seriousness, I mean it is I think in a lot of ways very helpful to look at the same kind of a situation, because in the union that's how we feel. We're not allowed to have equal access, equal ability to share information, equal ability to provide information as the employer in the setting of a union. We have to go to employees' homes. We have to stand at the bottom of the driveway in the bitter cold, which I've done many times, and hopefully people stop and talk to us.

PREPARED STATEMENT

So it's not how democracy was ever meant to be in this country. It should be that if you have a majority, the majority rules. That's what this country is set up on. So a lot of details on different situations I've been through in different campaigns are in my written testimony, but I will answer any questions you have.

[The statement follows:]

PREPARED STATEMENT OF EILEEN CONNELLY

Thank you for inviting me to testify before this committee today, my name is Eileen Connelly, I am the Executive Director of the Pennsylvania State Council for the Service Employees International Union (SEIU), which is the largest and fastest growing labor union in the AFL–CIO. SEIU represents 1.6 million workers nationally in healthcare, building services and public sector employment and 60,000 workers in Pennsylvania. I am a Vice President of the Pennsylvania AFL–CIO and a member of the Executive Committee of the AFL–CIO. Please accept my written testimony which I submit for the record of these proceedings.

In 1982 I was working as a Medical Lab Technician at Hazleton-St. Joseph Hospital in Hazleton, PA. At that time District 1199P had won an election for the technical employees and was negotiating a first contract. I was a member of the bargaining team. Since that time I have worked as both a member/organizer and beginning in 1984 as a full-time union organizer in numerous union organizing campaigns in Pennsylvania, primarily helping nursing home workers form a union so that they could engage in collective bargaining.

I take enormous pride in the fact that I have helped thousands of workers form unions in their workplaces and assisted workers through collective bargaining gain better wages, benefits and most importantly a voice for workers in the care of their patients. Today though, I want to tell you about the incredible obstacles workers face every day when they try to form a union. I have witnessed too much worker abuse, intimidation and harassment by employers who are unwilling to respect workers' rights to form unions. That is why there is a critical need to reform our nation's labor laws by passing the Employee Free Choice Act, S. 1925. Let me share with you some specific stories I have witnessed.

Because I have done the majority of my organizing work helping nursing home workers form unions, I ask this committee. Is it right that publicly funded or subsidized health care facilities use taxpayer dollars to thwart workers' rights and violate our nation's labor laws?

I have seen employers manipulate the NLRB election process in such a way as to turn the concept of democratic free choice on its head. Employers and their lawyers and consultants have become experts at playing the system, using the NLRB to frustrate, stall, and discourage workers from exercising their democratic right to form unions. Often, the result is that workers who have chosen to form a union are simply defeated in their efforts; sometimes, workers ultimately win, but only after tens or hundreds of thousands of dollars have been spent and months or even years have been wasted, bringing true meaning to Dr. King's axiom that "Justice delayed is justice denied."

Recently, our union got a call from a group of about 35 workers at The Residence on Fifth, an assisted living facility in Pittsburgh who wanted to form a union. These workers are the definition of the working poor, doing some of the most important work in their community, in this case for a large for profit company, but earning

literally poverty level wages. Our organizers met with them, and within a short period of time, they had built an organizing committee and signed up over 70 percent of the employees on union cards. They followed the current NLRB procedure and filed for an election. Instead of voluntarily agreeing to an election, the Employer responded by claiming that all of the LPNs and the lead cook at the facility are supervisors, and therefore have no legal right to organize. This triggered several days of hearings, followed by the filing of legal briefs, and then the decision by the NLRB Regional Office. All of this took months, with no election date in sight. The Board found that the Employer's position had no merit and that the disputed job classifications must be included in the bargaining unit. So you might think that the Employer lost the case. Not so—like so many other Employers, they never really expected to prevail on the issue, they simply wanted to delay the process so that they could use the time to intimidate and confuse the workers into backing down from organizing their union. And intimidate and confuse they did, with numerous one on one mandatory intimidation sessions with supervisors, many letters from the employer, and other tactics. The message was simple—we're the boss, we decide whether you have a job or not, and we are totally committed to stopping you from organizing a union. You could end up losing what you have, you will probably have to strike, and you may be permanently replaced. If you want to keep what you have, including your job, vote NO. These workers got the message loud and clear, and by the time the Board issued its decision in favor of the workers, support for the union had eroded to a small minority, and the union had no choice but to withdraw from the election. This story is repeated time and time again all over Pennsylvania when workers try to exercise their freedom to form a union.

Even when workers overcome these tactics and win an election, they often have their decision nullified later by more legal shenanigans. In 2002, workers at the Presbyterian Home of Hollidaysburg, PA voted to form a union. The home had argued that because they were a faith-based institution, their employees were excluded from the scope of the National Labor Relations Act, an issue that was long ago decided in favor of the workers by the Board and the Courts, and the NLRB Regional Office rejected the Employer's claim. But in this case, the Employer refused to accept the decision of the NLRB Regional Office and filed a request for review with the NLRB in Washington, DC. The result was that the workers' votes were impounded for about one full year from the time of the election, while the case wound its way through the Federal bureaucracy. After the votes were counted, revealing that the workers had won, the Home proceeded to stall negotiations for another year. By this time, workers had been waiting over 2 years for a contract, many of the workers who had organized the union had quit in frustration, and many of those who remained were convinced that they would never be able to succeed against their employer. Predictably, the employer was able to convince a group of workers to file for a new election to decertify the union, and that election will be happening in the next few weeks.

In an organizing campaign, the employer typically hires outside union busters to take over employee relations during the period of an organizing campaign, and apply techniques borrowed from psychology and sociology to turn employees against the idea of organizing. The union busters teach supervisors how to identify and target union supporters and how to use their supervisory authority to pressure the staff to refrain from exercising their right to organize. They put together letters and leaflets to scare and confuse workers. Often, they meet directly with workers in mandatory one on one or group "captive audience" meetings. They develop slick videos and websites full of misinformation and half truths about the labor movement. And they do it all for a hefty price. In recent years, Pennsylvania health care institutions from Allegheny General Hospital in Pittsburgh, to Geisinger Medical Center in Danville, to Wyoming Valley Health Care System in Wilkes-Barre, have hired expensive union busting consulting firms from, respectively, Ohio, Arizona, and Malibu, California, to attempt to defeat workers organizing efforts, in each case paying hundreds of thousands of dollars. Now I ask you. Who is paying for this employer activity? The patients? Their families? Or the taxpayers, through Medicare and Medicaid funding? The answer is, all of the above. A few years ago, the office of the Auditor General of PA found that Geisinger Health System had illegally used nearly $300,000 in public Medicaid dollars on an anti-union consultant firm from Arizona. Unfortunately, under current law, Geisinger suffered literally no penalty for this illegal diversion of funds—none.

Needless to say, NLRB elections are conducted in an inherently coercive environment—the workplace. The employer—not the union—has ultimate power over employees. Only the employer has the ability to withhold wages or grant increases in salary, assign work and shifts, and ultimately discharge workers—the capital punishment of the workplace.

In the end, even when conducted by NLRB professional staff, elections under the NLRA are not democratic, because the workplace is not democratic.

The Employee Free Choice Act is intended to remove these obstacles and at the same time improve cooperation between employees and employers by eliminating the requirement of mandatory voting when the majority of workers has already expressed its decision to self-organize. Under current laws, it is perfectly legal for a majority of employees to choose union representation without the need for an election; however, as it now stands, their employer has the right to veto their decision, absent an NLRB election. Again, it is not the employer's choice to form a union, it is the choice of the employees.

SEIU is using this legal majority verification procedure (commonly known as "card check") more and more. Some employers, generally in situations where workers have already built a strong union presence in their company over many years of conflict and struggle, have agreed to a card check procedure like the one envisioned by the Employee Free Choice Act. Here in Pennsylvania, the best example is the huge nursing home company, Beverly Enterprises. Senator, I know that you are aware of the long history of struggle of the Beverly employees in this state to exercise their legal right to form unions. At one time, Beverly was known as the#1 violator of workers' right to organize in the history of the National Labor Relations Act, and as a result this company is the subject of an extraordinary national cease and desist order issued by the Federal Courts for violations of workers' rights. Unfortunately, it took literally 20 years of fighting, including the largest nursing home strike in Pennsylvania history, to hold the Company accountable for its actions under the current labor laws. The two decades of strife and conflict between Beverly and its workers were bad for everyone affected, including the taxpayers and certainly the residents of Beverly's homes. But earlier this year Beverly and SEIU began a new era of collaboration and cooperation that puts quality care and services for residents and fairness for workers front and center. We are working together to ensure proper funding for nursing homes, and were proud to stand with you at a Beverly facility in northeastern PA recently to call for release of the funds desperately needed by our long term care industry to provide quality care. And we have instituted a new card check procedure by which workers at three Beverly homes have recently exercised their right to organize the union with none of the conflict, acrimony, and wasted resources that have typified Beverly workers' organizing efforts in the past. The process is working for everyone, and it is working well.

Another company, Addus Home Care, recently reached a similar agreement with SEIU, allowing a group of home care workers in Philadelphia to form a union through card check verification earlier this year.

So some employers are recognizing that there is a better way of conducting the union recognition process that truly respects workers' rights. But too often, employers refuse to grant recognition, even when presented with overwhelming proof that a majority of workers have signed authorizations. In fact, it has been my experience during organizing campaigns, we present proof that 60 percent, 70 percent or more worker signed cards. Card check, or majority verification, provides workers a means of making a free and fair decision about joining a union.

The NLRB election process is a meat-grinder, and allows the employer a free-hand to wage a campaign where employees are intimidated, threatened, spied upon, harassed, and—in a quarter of all cases—fired,[1] in order to suppress the formation of a union.

Our union has seen this on far too many occasions—here's just one example. Several years ago, a group of workers at South Fayette Nursing Center, a small nursing home in the hills of southwestern PA called us to assist them in forming a union. The conditions at this home were really abysmal, and the workers' choice to unionize was nearly unanimous—over 90 percent of them signed up to join the union in two or three days. Now this operator was no Beverly Enterprises, he was a small businessman operating on a tight margin. But let me tell you, he spared no expense in trying to stop workers from exercising their rights. He hired not one but two union-busting consultant firms, one of whom sent in a union buster who spent every single day and night in the facility for weeks before the election, forcing workers to meet with him in small groups and one on one, sowing fear and confusion among these workers. He threatened that the company would close the home if they voted yes. He told them they would lose what they already had. He told them the union was corrupt and would steal their money. He showed them carefully edited videos of strikes and tried to associate the union with violence and sabotage. Meanwhile, the workers had virtually no access to union folks to talk them through

[1] Kate Bronfenbrenner, Uneasy Terrain: The Impact of Capitol Mobility on Workers, Wages and Union Organizing, September 6, 2000.

any of theses issues. Union organizers and union members from nearby facilities had to stand at the end of a long driveway in the winter snow at shift change, or find workers outside of work at their homes, to have any direct contact with them, but they were getting barraged every day at work. By the time the union buster got done with them, many of these workers were completely intimidated and confused. Nonetheless, the workers voted for the union, by one vote. The employer responded by filing objections to the election claiming that the union—that's right the union!—had threatened and intimidated workers. What's more, within a week of the election they fired one of the key leaders of the organizing campaign, who they outrageously claimed had threatened workers into voting yes.

Months and months later, the Labor Board dismissed the objections and negotiated a cash settlement for the fired worker, who by then had moved on with his life and gotten another job. But the message to the workers was clear: stand up for the union and you risk your job. After a year of stalling negotiations for the first union contract, the employer got a group of anti-union workers to file for a decertification election. By then, few workers who had been at the home at the time of the original election even remained, and most of those who had been there from the beginning were scared to participate in union activities. Not surprisingly, the union was decertified. This story is not an exception, but too often the rule when workers try to organize in America today. Any union like ours that has been actively out there trying to help workers organize under the current legal framework could give you numerous other examples of this type.

Until one has been through the meat grinder of trying form a union under the current procedure, or at least seen it first hand, it is very hard to understand why the process of having elections in the workplace isn't really democratic at all. After all, elections are the basic way that we make decisions in our democratic society. But Senator, I can tell you, that if we ran political elections in this country under the rules that apply to union elections, not a single American would consider them free and fair exercises in democracy. Imagine a political election where one candidate has 100 percent guaranteed access to the voters five days a week, while the other has to try to communicate from one state over. Where if voters vote or campaign against the incumbent, they may very likely be out of a job, and even if they prove they were fired for their campaign activities, it can take literally years for them to get their job back. The reality is that elections under the NLRA bear almost no resemblance to the free and fair elections in which we all participate in the political arena.

Finally, this legislation would create meaningful penalties for violations of the Act. The bill would not restrict employer free speech, but would ensure the employer speech is not coercive or threatening, or intended to deter employee free choice. Under current law discipline or discharge of workers for union activity, threats to close or move the workplace, harassment and intimidation of workers at "captive audience" or one-on-one meetings with supervisors on work time, interrogation and surveillance of workers suspected of wanting to form a union are all technically illegal under the NLRA. Under current law in most instances, the only sanction an employer faces for its conduct is posting a cease-and-desist order in the workplace. Firing and disciplining workers, or having to post a notice is an acceptable cost of doing business for employers. They know they don't face any real economic penalty for violating worker's rights.

This bill would create fines of up to $20,000 per infraction, and provide for triple back pay awards for fired and disciplined workers. I know that if the employer at South Fayette Nursing Center had to pay a substantial fine and triple back pay to the worker that they illegally fired the week after the union election, they would probably have thought twice about breaking the law, and those workers would in all likelihood have a union today.

In summary, the Employee Free Choice Act would reform the NLRA so that when a majority of workers demonstrate their choice to form a union their representative can be certified by the NLRB without the need for the NLRB election. The legislation would also guarantee effective and efficient collective bargaining, and create real penalties as a determent to unlawful employer conduct.

Thank you for giving me this opportunity to testify before this committee I urge your support of the Employee Free Choice Act, S. 1925. I am happy to answer any questions you might have regarding my testimony.

Senator SPECTER. Okay. Thank you very much, Ms. Connelly. We'll come back to you on some of the things you've said during the question-and-answer session.

We turn now to Ms. Sarah Fox, a labor lawyer from the firm of Bredhoff and Kaiser in Washington. From 1996 to 2000, she served as a member of the National Labor Relations Board, has also served as Chief Democratic Labor Counsel to the U.S. Senate Committee on Labor and Human Resources, graduate of Yale University with a law degree from Harvard.

I might note just parenthetically that Ms. Fox has been very heavily engaged, as I have, on the asbestos problem, which poses a major concern for both injured workers and for corporations which have been driven into bankruptcy. There are at the present time thousands of people who suffer very serious injuries from life-threatening ailments like mesothelioma whose companies have gone bankrupt, and at the same time the jobs have been lost, the companies have gone down, some 70 major bankruptcies in the United States.

Last year the Senate passed a bill out of committee to try to do something about this. So a trust fund was created in excess of $100 billion. The thought was there would be schedules like Workers' Compensation so you didn't have to go to court to prove fault. You could collect on a showing of injuries.

I enlisted the aid of a Federal judge, retired Judge Becker, and for 2 full days last August, we sat in his chambers with him in Philadelphia. We've had meetings in my office every 2 or 3 weeks since. Another meeting is scheduled for next week. We've ironed out a lot of problems. It's my view that we will come to a consensus here, that is, a consensus between the manufacturers and insurers on one side and the AFL–CIO, trial lawyers, plaintiffs' lawyers on the other side.

When you have an issue that intense, what we try to do is get people to agree. I don't think you can legislate unless there is that kind of agreement. We'd be looking for some agreement here, too, and that's one thing, it's useful to see if you can find ways that people can come to an agreement.

But Ms. Fox has done quite a job there and it's a subject which hasn't received a lot of attention, so I think it's worth a moment or two to tell the millions of people watching on Pennsylvania Cable Network, this is being broadcast live, the millions of people watching what is going on.

Ms. Fox, that doesn't take a minute of your 5 minutes. It begins now.

STATEMENT OF SARAH FOX, ESQUIRE, BREDHOFF AND KAISER, TESTIFYING ON BEHALF OF AFL–CIO

Ms. FOX. Thank you very much for your introduction. I really appreciate the opportunity to be here today to talk to you for once not about asbestos but about S. 1925, the Employee Free Choice Act.

It is particularly a pleasure for me to be here because two of the other witnesses are former colleagues of mine on the Board. Mr. Cohen and I served together in 1996. And Mr. Higgins, although he didn't mention it, he's a career NLRB employee, but has also had two stints as a member of the Board, including one that overlapped with mine. So we had sort of a reunion here today.

I'd like to focus particularly today on the provisions of the Employee Free Choice Act which deal with what is referred to some-

times as card check recognition. So I'm happy to answer questions about the other provisions, but I wanted also just to set the stage for this by talking a little about the history of the Act and the history of this procedure under the Act, because I view it not as what is being proposed here, not as a radical change in the Act, but as really restoring the initial premise of the National Labor Relations Act.

The Act was enacted in 1935 because all over the country millions of workers or hundreds of thousands of workers were organizing into unions and their employers were refusing to bargain with them, to respect their choice to be represented by unions in their dealings and to bargain collectively with them.

The Act for the first time imposed a legal obligation on employers to bargain with majority representatives, and the language of the statute is "designated or selected by their employees."

The Act also had a provision for the Board to certify unions as majority representatives, but it specifically contemplated that certification was not the only way that a union could become the majority representative and that the employer would have to bargain with them, that outside of the Board process, if the union could demonstrate majority support, it was perfectly lawful for the employer to recognize and bargain with them.

For the first several years under the Act, the Board certified without secret ballot elections, that is, when a union filed a petition the Board would hold a hearing and the union could put in evidence that membership rolls, cards that were signed, show that a majority of the workers had participated in a strike. Any kind of evidence that the Board considered sufficient to establish that a majority supported the union was enough to achieve a certification.

Now, the Board did in about 1940 start a practice of not certifying unless—automatically just calling for an election in those circumstances, and that was codified by Congress in 1947. Nevertheless, the other procedure of voluntary recognition continued and, in fact, to call it voluntary recognition is a bit of a misnomer, because until the mid' 60s, an employer who was presented with evidence of majority support was required to recognize and bargain with the union unless he had a good faith doubt.

The Board for many years was very clear that a good faith doubt could not be wanting to buy time to try to persuade the employees not to support the union or otherwise trying to undermine support for the union.

It is only since 1966 that employers have had this right, when presented with this evidence by their employees, to say it's up to us and we've decided that we won't accept the evidence, we will make you have an election regardless of whether we believe that at this time the union, in fact, represents a majority.

So to say that this is a radical change I think overstates how relatively recent in the history of the Board the total focus on the election has been.

People talk a lot about—and I want to emphasize that, because people talk a lot about this process of cards as being unreliable, but employers do have the right to recognize now on the basis of cards and they don't complain in those situations that it's unreliable.

Employers also have the right under the law now when they have a union in place and a majority of the employees come with a petition that says we don't want the union anymore, the employer has the legal right to withdraw recognition from the union on the basis of those signatures.

So we have this anomalous situation under the law that if you had a certified union that had won a Board election and a majority of employees presented a petition to the employer, the employer could say no more union. But if 1 year later the exact same employees and the same number of employees presented a petition to the employer saying we want the union, the employer would have the choice of whether to recognize them or to demand an election.

So I just wanted to put a little of this into perspective and I'm happy to answer any questions.

Senator SPECTER. Thank you very much, Ms. Fox. We turn now to Mr. Glenn Taubman, who for the past 20 years has been a Staff Attorney with the National Right to Work Legal Defense Foundation. Mr. Taubman has his law degree from Emory University School of Law. Thank you for joining us, Mr. Taubman, and the floor is yours.

STATEMENT OF GLENN M. TAUBMAN, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

Mr. TAUBMAN. Thank you, Senator. Thank you for the opportunity to comment on the important issues before the Committee. I am a Staff Attorney with the National Right to Work Foundation and since 1968 the Foundation has provided free legal aid to workers who choose to stand apart from a labor union to exercise their right to refrain that Congress gave them in Section 7 of the National Labor Relations Act. And, more importantly, it is their right under the First Amendment of the United States Constitution.

I am pleased to be here among witnesses for organized labor and witnesses for various employers, for each of these groups have their own agendas and their own self interests. I am here to speak on behalf of another group, the group for whom the National Labor Relations Act was specifically designed. I'm speaking about individual employees, the workers who have First Amendment and Section 7 rights to join or an equal right to refrain from joining a labor union.

It is these employees whose rights are sacrificed or potentially sacrificed whenever a union is chosen to act as their exclusive bargaining representative, because these individual workers may not desire such representation and, indeed, may strongly oppose it. In such situations, these workers' rights to enjoy the fruits of their own labor are extinguished or greatly limited by the mere existence of a bargaining agent whom they do not desire.

Thus, what we're really talking about with this bill is the extent to which individual employee rights, which are already limited under the National Labor Relations Act, are going to be further limited through the card check recognition process. This euphemistically entitled process strips away any possibility that employees will vote in a secret ballot election as to whether they wish to have or refrain from having a union.

This process also eliminates or very drastically reduces NLRB and Federal Court oversight of the union selection or rejection process, leaving employee rights in the hands of self-interested unions who are desperate for more dues paying members and self-interested employers who may be desperate to avoid a union corporate campaign or similar union pressure tactics or who may simply want to cut a financially beneficial deal with a compliant or favored union of its choosing.

This is not just pie in the sky rhetoric but part of a documented trend. You need to only look at a case like the NLRB and the U.S. Court of Appeals 2004 decision in *Duane Reade,* a case regarding the UNITE union, or, for example, an earlier case called *Windsor Castle Health Care* involving the SEIU union, to find examples where employers and unions shamelessly colluded to force unwanted union representation on nonconsenting employees, all based upon supposed card check recognition.

Every card check campaign is inherently coercive and the contrast between the rules governing an NLRB supervised secret ballot election and the rule of the jungle governing card checks could not be more stark.

When an employee signs or refuses to sign a union authorization card, he is likely not to be alone. To the contrary, it is likely that he will be asked to sign in the presence of one or more union organizers. And by signing that card, he is thereby casting, quote, a vote for the union.

This solicitation could occur during an unwanted home visit, in any circumstance, the employee's decision is not secret as in an election, because the union clearly knows who signed the card and who didn't. Indeed, once an employee has made the decision yea or nay in a secret ballot election, the process is at an end.

By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the jaws of a card check drive, but often represents only the beginning of harassment and intimidation for that employee.

As my client Clarice Atherholt's statement indicates, many employees signed union cards in her shop just to get the union organizers off their back, not because they really wanted the union to represent them. Is that fair?

PREPARED STATEMENT

Senator, I do not think that your constituents would want to cast their vote for President or Senator or mayor under similar circumstances with active poll watchers from one of the candidates or political parties looking over their shoulder, knowing precisely how they vote, and continually harassing them if they vote the wrong way, all in an election, quote, unquote, that has no time limits and can stretch on for months or even years until such time as the candidate browbeats enough, quote, voters to get the votes he needs. Simply stated, this is not the American way.

Thank you for your time. I ask you to not support the Kennedy-Miller bill and, in fact, to support Congressman Charles Norwood's bill that mandates secret ballot elections. Thank you.

[The statement follows:]

PREPARED STATEMENT OF GLENN M. TAUBMAN

Chairman Specter and Distinguished Senators: Thank you for the opportunity to comment on the issues raised in these important hearings.

My name is Glenn Matthew Taubman. I am a Staff Attorney with the National Right to Work Legal Defense Foundation, in Springfield, Virginia. Since the Foundation was founded in 1968, it has provided free legal aid to workers who choose to stand apart from a labor union, to exercise the "right to refrain" that Congress granted them under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, and that, more fundamentally, is guaranteed by the First Amendment's freedom of association.

I have worked as a Foundation staff attorney for more than twenty years. In that time, I have provided free legal representation to thousands of individual employees nationwide, seeking through litigation to vindicate their fundamental constitutional and civil rights against compulsory unionism abuses perpetrated by both unions and employers. In addition to representing public sector employees in a wide variety of federal civil rights cases dealing with the abuses of compulsory unionism,[1] I have spent a large part of my professional life litigating cases under the National Labor Relations Act.[2] In recent years, I have been representing individual employees facing a new challenge to their right to refrain from compulsory unionism: so-called "neutrality and card check" programs hatched by unions to help force union "representation" on unwilling employees. I am counsel or co-counsel in numerous currently pending cases challenging some form of "neutrality and card check" scheme.[3]

WHAT IS "NEUTRALITY AND CARD CHECK?"

Frustrated that workers are not voluntarily choosing to join or be represented by unions, labor union officials have turned to organizing employers and imposing unionization on employees from the top down. The National Labor Relations Board reports that unions win less than 50 percent of secret ballot elections, and that figure does not even include the many occasions where unions withdraw election petitions and walk away because they lack employee support. Of necessity, union officials do not want to publicize these election losses, preferring to act secretly. A case in point recently occurred at the Magna Donnelly plant in Lowell, Michigan. There, the United Auto Workers union (UAW) secured an agreement for strict employer neutrality, but with the stipulation that there be a secret-ballot election. Even with strict employer neutrality, the UAW lost badly, with one employee publicly commenting to the local newspapers, "Unions are not needed in America anymore."[4] Unions obviously would rather operate in secrecy.

Even putting all of this aside, the basic issue under discussion in these hearings is simply one of worker free choice, the right of employees to freely choose or reject representation by a particular union. That is the heart of the NLRA. Proposals like

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[1] *Tierney* v. *City of Toledo*, 116 LRRM 3475 (N.D. Ohio 1984), *aff'd*., 785 F.2d 310 (6th Cir. 1986), *vacated and remanded*, 106 S. Ct. 1628 (1986), *reversed on reconsideration*, 824 F. 2d 1497 (6th Cir. 1987), *further proceedings*, 917 F.2d 927 (1990); *Lowary* v. *Lexington Local Board of Education*, 124 LRRM 2516 (N.D. Oh. 1986), *reversed*, 854 F.2d 131 (6th Cir. 1988); *further proceedings*, 704 F. Supp. 1430 (N.D. Ohio 1987), *further proceedings*, 704 F. Supp. 1456 (N.D. Ohio 1988), *further proceedings*, 704 F. Supp. 1476 (N. D. Ohio 1988), *affirmed in part and reversed and remanded in part*, 903 F.2d 422 (6th Cir. 1990); *Jordan* v. *City of Bucyrus*, 739 F. Supp. 1124 (N.D. Ohio 1990), *further proceedings*, 754 F. Supp. 554 (N.D. Ohio 1991).

[2] *E.g., UFCW Local 951* v. *Mulder*, 812 F. Supp. 754 (W.D. Mich. 1993), *aff'd*, 31 F.3d 365 (6th Cir. 1994); *NLRB* v. *Office and Professional Employees Intern. Union, Local 2, AFL–CIO,* 292 NLRB No. 22 (1988), enforced, 902 F.2d 1164 (4th Cir. 1990); *California Saw and Knife Works*, 320 NLRB 224 (1995); *Schreier* v. *Beverly California Corp.*, 892 F. Supp. 225 (D. Minn. 1995); *Bloom* v. *NLRB*, 153 F.3d 844 (8th Cir. 1998), *vacated*, 209 F.3d 1060 (2000); *Production Workers of Chicago (Mavo Leasing)*, 161 F.3d 1047 (7th Cir. 1998); *Penrod* v. *NLRB*, 203 F.3d 41 (D.C. Cir 2000).

[3] *UAW and Freightliner/Daimler-Chrysler*, Case Nos. 11–CA–20070–1, 11–CA–20071–1, 11–CB–3386–1, 11–CB–3387–1; *UAW and Dana Corp. (Elizabethtown, KY)*, Case Nos. 9–CA–40444–1 and 9–CB–10981–1, Case Nos. 9–CA–40521–1 and 9–CB–10996–1; *UAW and Dana Corp. (Bristol, Va)*, Case Nos. 11–CB–3397, 11–CB–3398, 11–CB–3399, 11–CA–20134, 11–CA–20135, 11–CA–20136 (Region 11, Winston-Salem); *Heartland Industrial Partners and United Steelworkers of America (USWA)*, Case No. 8–CE–84–1 (Region 8, Cleveland Oh.); *Patterson* v. *Heartland Industrial Partners, et. al*, No. 5:03 CV 1596 (U.S. District Court, N.D. Ohio); *UAW and Dana Corp. (St. Johns, MI)*, Case Nos. 7–CA–46965–1 and 7–CB–14083–1, 7–CA–47078–1 and 7–CB–14119, and 7–CA–47079–1 and 7-CB–14120; *UAW and Dana Corp. and Metaldyne Precision Forming/UAW (St. Marys, PA)*., 341 NLRB No. 150 (June 7, 2004) (granting review in two decertification cases); *United Steelworkers of America and Cequent Towing Products (Goshen, IN)*., NLRB Case No. 25–RD–1447.

[4] *'Neutral' Union Bid Fails First Local Test*, Grand Rapids Press, September 27, 2003, p. A–1.

the Kennedy-Miller legislation, which virtually outlaw secret-ballot elections under the NLRA, do not enhance this right to freely choose or reject a union. Instead, they strip workers of their already limited rights against unions, and impose an undemocratic system with no checks and balances.

This is especially true given the growth of so-called "neutrality and card check" agreements. In these agreements, unions and employers take deliberate advantage of the NLRB's rules to delete the Board from the process in which employees choose (or reject) union representation. Exclusion of the Board from the representational process leaves employees' rights in the abusive hands of employers and unions, each of which is pursuing its own self-interests under these agreements. Unions are desperately seeking additional members and dues revenues. Employers are (naturally) pursuing their business interests, such as avoiding coercive union corporate campaigns or obtaining a pre-negotiated "sweetheart deal" regarding future-organized employees' terms and conditions of employment. Neither entity has any interest in protecting employees' rights to freely choose or reject union representation, the very rights the NLRA exists to protect.

Under "neutrality and card check" agreements, the employer anoints a particular union, and negotiates a secret, pre-arranged "partnership agreement" that obligates the employer to assist its "partner" union with organizing the employees. The employer then provides that anointed union with special privileges (e.g., captive audience speeches praising the new "partner" union, lists of employees' home addresses, gerrymandered bargaining units to weed out union opponents, and the waiver of secret ballot elections in favor of so-called "card checks"), and turns a blind eye as the union harasses and misleads employees into signing union authorization cards. Employee free choice should not, and under the text of the NLRA cannot, be subject to the vagaries of self-interested unions and employers. *See MGM Grand Hotel*, 329 N.L.R.B. 464, 469–75 (1999) (Member Brame, dissenting).[5] Abolition of "voluntary recognition," or at least strong curbs on its abuse, are needed to protect the paramount employee right to freely choose or reject union representation.

So what exactly is a "neutrality agreement?" It is an enforceable contract between a union and an employer usually kept secret from the very employees it targets[6]—under which the employer agrees to support a union's attempt to organize its workforce. Although these agreements come in several different forms, common provisions include:

—*Gag Rule*.—While most neutrality agreements purport merely to require an employer to remain "neutral," in reality they impose a gag order on speech not favorable to the union. A company, including its managers and supervisors, is prohibited from saying anything negative about the union or unionization during an organizing drive. Employees are only permitted to hear one side of the story: the version the union officials want employees to hear. In a recent speech to the ABA, NLRB Chairman Battista criticized the growing use of neutrality agreements and stated that the "purpose of using neutrality agreements is not to expedite [employee free choice], but to silence one of the parties." Daily Labor Reporter, *Five Members Discuss Decisionmaking, Wide Variety of Issues at ABA Meeting*, August 15, 2003, Page B–1.

For example, the UAW's model "neutrality clause" states that an employer may not "communicate in a negative, derogatory or demeaning nature about the other party (including the other party's motives, integrity, character or performance), or about labor unions generally."[7] In practice this requires employers to refrain from providing even truthful information in response to direct employee questions. In contrast to this employer silence, the UAW's model neutrality agreement requires the signatory employer to affirmatively "advise its employees in writing and orally that it is not opposed to the UAW being selected as their bargaining agent." Such limits on free speech, and requirements of forced pro-union speech, are purposefully designed to squelch debate and keep employees in the dark about the union that covets them.

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[5] The Senate need look no further than the Board's recent decision in *Duane Reade, Inc.*, 338 N.L.R.B. No. 140 (2003), *enforced*, Case No. 03–1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004), to see this union and employer self-interest at work. There, in blatant disregard of employees' § 7 rights to freely choose or reject a union, the employer unlawfully assisted its handpicked union in coercing employees to sign union authorization cards so that "voluntary recognition" could be bestowed.

[6] Attached as Exhibit 1 is the Declaration of Clarice Atherholt, the petitioner in *UAW and Dana Corp. (Upper Sandusky, OH)*, Case No. 8–RD–1976. Ms. Atherholt describes her inability to even see the secret agreement that her employer, Dana Corporation, entered into with the UAW.

[7] See http://www.nrtw.org/d/uawna.pdf

In *Chamber of Commerce* v. *Lockyer*, 364 F.3d 1154, 1166 (9th Cir. 2004) (emphasis added), the Ninth Circuit recently struck down a state law mandating "neutrality" because it directly interfered with employees' right to organize or refrain from doing so. The Ninth Circuit reached this conclusion because "an overriding principle of the NLRA is that the collective bargaining process cannot function unless both employers and employees have the ability to engage in open and robust debate concerning unionization." This interest in "open and robust debate" about the pros and cons of unionization is hardly enhanced by employer gag rules favoring one anointed union.

—*No Secret Ballot Election*.—Most neutrality agreements include a "card check" agreement. Under such an agreement, employees are not permitted to vote on union representation in a secret ballot election monitored by the National Labor Relations Board. Instead, the employer pledges to recognize the union automatically if it can produce a certain number of signed union authorization cards. Experience shows that employees are often coerced or misled into signing these authorization cards. For example, employees report being falsely told that these union authorization cards are merely health insurance enrollment forms, nonbinding "statements of interest," requests for an election, or even tax forms.[8]

Indeed, the United States Supreme Court has recognized this as well: "We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue."[9]

Moreover, when an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, it is likely that this decision is made in the presence of one or more union organizers pressuring the employee to sign a card. This solicitation could occur during or immediately after a union mass meeting or a company- paid captive audience speech, or it could occur in the employee's own home during an unsolicited union "home visit." In all cases the employee's decision is not secret, as in an election, since the union clearly has a list of who has signed a card and who has not. Thus, a choice against signing a union authorization card does not end the decision- making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment and intimidation for that employee.

In sharp contrast, each employee participating in an NLRB-conducted election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has made the decision "yea or nay" by casting a ballot, the process is at an end. Thus, only with an Orwellian world-view can unions claim that "we save industrial democracy and employee free choice by doing away with the secret ballot election."

—*Access to Premises*.—Neutrality agreements commonly give the union permission to come on company property during work hours for the purpose of collecting union authorization cards. This differs from the guidelines set by the NLRB and the courts, under which an employer has no obligation to, and may actually be prohibited from, providing the union with such sweeping access to its employees.

—*Access to Personal Information*.—Neutrality agreements frequently require that the company provide personal information about employees to the union, including where employees and their families live. Armed with a company-provided list of the names and addresses of each employee, union officials can conduct "home visits" to pressure employees to sign union authorization cards.

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[8] Attached as Exhibit 2 is a sworn Declaration of Faith Jetter in Support of her Motion to Intervene or, Alternatively, to File a Brief Amicus Curiae in the case of *Sage Hospitality Resources, LLC* v. *HERE Local 57*, 299 F. Supp. 2d 461 (W.D. Pa. 2003), appeal pending, No. 03–4168 (3d Cir.) (Before any employees were hired, the City of Pittsburgh pressured hotel operator to sign a neutrality and card check agreement as a condition of approving the public financing necessary to complete its project, even directing the hotel operator to contact specific HERE officials to negotiate this mandatory arrangement). In her Declaration, Ms. Jetter describes her own harassment at the hands of the union granted such "neutrality," and in addition states: "I also saw the union representatives try to coerce another employee to sign a card, even though they never explained to the employee what this card meant, or told her that the union could be able to be automatically recognized as the representative of the employees without a secret ballot election. It was clear to me that this employee had no idea what this card meant when the union tried to get her signature."

[9] *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 604 (1969).

Employee Faith Jetter attested to what happened after her employer provided the HERE union with her personal information:

"I was called at home and also contacted in person by HERE union representatives and urged to sign a union authorization card. These union representatives already had my name and home address and telephone number. I was asked if the union representatives could come to my home and make a presentation about the union. I allowed them to come, as I was willing to listen.

"Two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me to out dinner. I refused to sign this card as I had not yet made a decision at that time.

"Shortly thereafter, the union representatives called again at my home, and also visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented by this union, and that I would not sign the card.

"Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy." [10]

—*Captive Audience Speeches*.—Employees may be forced to attend company-paid "captive audience" speeches pursuant to neutrality agreements. In these mandatory forums, the union and management work together to pressure employees to sign up for the union. Sometimes it is announced that the union and company have already formed a "strategic partnership," making union representation seem a foregone conclusion. In one facility owned by Johnson Controls Inc., it was strongly implied that if workers did not support the union's organizing effort, they risked losing potential job opportunities. Can it be said that employees freely signed cards after such coercion?

HOW DO UNIONS SECURE NEUTRALITY AGREEMENTS?

Employers are often pressured into neutrality agreements by union picketing, threats, or comprehensive "corporate campaigns." Some employers are pressured into neutrality agreements by other companies who are acting at the behest of union officials. A neutrality agreement itself may require an employer to impose the neutrality agreement on other companies with whom it affiliates. But do employees who are targets of these agreements approve? Are they ever asked? Many do not even know that such a deal covering their unionization exists. As employee Faith Jetter noted in her sworn Declaration (Exhibit 2), "I heard that the Hotel and the HERE union signed an agreement covering the union's attempt to organize the employees of the Hotel. I also learned that this agreement required my employer to give the HERE union a list of employees' names and addresses, and access to the employees inside of the Hotel. No one asked me if I approved of this, and I do not. I am opposed to the Hotel giving the HERE union a list of with my name and personal information, and allowing them access to me in the workplace."

Even more ominous, there is a growing trend in which state and local politicians pass laws mandating that employers who wish to do business with the state or locality must sign neutrality agreements. In one notorious case, the San Francisco Airport Authority mandated that any concessionaires who wished to lease space at the airport had to first sign a neutrality agreement. That governmental interference in private labor relations was held to be federally preempted, and was enjoined.[11] Unfortunately, many state and local politicians are still attempting to require neu-

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[10] *See* Exhibit 2 attached hereto.

[11] *Aeroground, Inc.* v. *City & County of San Francisco,* 170 F. Supp. 2d 950 (N.D. Cal. 2001) (municipal ordinance which regulated private-sector labor relations and mandated the waiver of rights and interests protected by the NLRA is unconstitutional as preempted); *see also Chamber of Commerce* v. *Lockyer*, 225 F. Supp. 2d 1199 (C.D. Cal. 2002) (similar state statute preempted), *affirmed,* 364 F.3d 1154 (9th Cir. 2004); *Metropolitan Milwaukee Ass'n of Commerce* v. *Milwaukee County,* 325 F.3d 879 (7th Cir. 2003) (employer association has standing to challenge county ordinance requiring employers to enter into "labor peace agreements").

trality agreements as a condition of contracting with the government or of obtaining grants, even though most, if not all, such requirements are federally preempted.

The bottom line is this: employees' rights of free choice are sacrificed and lost under so-called "neutrality agreements." Instead of being able to freely choose for themselves whether they desire union representation through a secret ballot election, management and union officials work together to impose unionization on workers from the top down.

EXAMPLES OF WORKER ABUSE UNDER "NEUTRALITY AGREEMENTS"

There are many pending legal cases challenging neutrality agreements and card checks as abuses of workers' rights, some of which are cited in footnote 3 above. One that particularly highlights these abuses is *Dana Corp. and UAW*, Case Nos. 7–CA–46965–1 and 7–CB–14083–1and 7–CA–47078–1 and 7–CB–14119.

In this case, the UAW has been trying to unionize the Dana Corporation plant in St. Johns, Michigan ("Dana St. Johns") for several years, without success. In August, 2003, the UAW reached a "partnership" agreement with Dana that covers the employees of Dana St. Johns (and others), even though the UAW does not represent any of the targeted employees. The terms of this "partnership" agreement have been kept secret.

This "partnership" agreement is undisputably a "labor contract" enforceable under § 301 of the NLRA, 29 U.S.C. § 185. *See UAW* v. *Dana Corp.*, 278 F.3d 548 (6th Cir. 2002). The provisions of this enforceable contract: (1) establish a "card check" and dispense with NLRB-supervised secret ballot elections, (2) establish joint UAW-Dana captive audience speeches; (3) gag all supervisors from even truthfully answering employees' questions; (4) give union organizers wide access to employees in the plant; and (5) give union organizers personal information about the employees including home addresses all with the joint goal of prodding these employees into accepting the UAW as their representative. In practice, the UAW has also used this "partnership" to limit employees' ability to revoke their authorization cards, by informing them that in order to do so, one or more union officials must personally come to their homes!

The UAW and Dana entered into their "partnership" agreement out of fear that the union would continue to fail in its quest to unionize the employees at Dana St. Johns and elsewhere. This "partnership agreement" is a classic example of a "bargaining to organize" scheme, wherein union officials commit to act in a manner favorable to management interests in exchange for employer assistance with gaining and maintaining control over employees.[12] Despite public fanfare about the existence of this "partnership," the specific terms of the agreement are secret from the very employees it targets, and whose interests it compromises.

As noted, the employees of Dana St. Johns have long rejected the UAW as their collective bargaining agent. It is for this reason that in the fall of 2003, a majority of the Dana St. Johns employees signed a petition which stated unequivocally:

PETITION AGAINST UAW "REPRESENTATION"

The undersigned employees of Dana Corporation-St. Johns, MI., do NOT want to be "represented" by the UAW union, do NOT want to join the UAW union, and do NOT wish to support the UAW union in any manner.

To the extent that any of the undersigned employees have ever previously signed a UAW membership card or UAW "authorization card", the undersigned hereby REVOKES that card. More specifically, that Dana Corporation, the UAW union, and all third parties or arbitrators take NOTICE that any such card signed by an undersigned employee prior to the signing of this petition is NULL AND VOID.

The undersigned employees of Dana Corporation DO NOT wish to be subjected in any way to the "partnership agreement" sign by corporate Dana officials and corporate UAW officials, and request that Dana Corporation and the UAW union CEASE giving any affect to the "partnership agreement" at this Dana plant in St. Johns, MI.

The undersigned employees of Dana Corporation hereby request that Dana Corporation NOT disclose or otherwise reveal to the UAW union, or its agents, any personal information about them; including, but not limited to: their name, social security number, home address, telephone number, job title, or work history.

The undersigned employees of Dana Corporation hereby request that Dana Corporation expressly recognize that the UAW union does NOT represent a majority

[12] Even the union oriented press has reported that the UAW trades employee wages and benefits for "neutrality," *see* "UAW Trades Pay Cuts for Neutrality" at http//www.labornotes.org/archives/2003/07/c.html and http//www.labornotes.org/archives/2003/10/b.html

of the employees at this facility, at which we work, for an irrevocable period of one-year.

This petition states in part that the undersigned employees recognize the destructive and self-serving behavior of the UAW, and its documented role in union violence, union corruption, and plant closures caused by featherbedding and other uneconomic union work rules.

Finally, I DO NOT want any UAW officials, organizers, or agents calling or visiting me at my home. I hereby deny access to my property to any UAW official, organizer, or agent.

Respectfully Submitted,

DANA CORPORATION,
St. Johns employees.

Copies of this petition—signed by a majority of employees—were delivered to both Dana management officials and UAW officers. However, the petition was not acted upon by Dana or the UAW. Although the petition recites that the signatures are irrevocable for one year, Dana and the UAW nevertheless conducted their captive audience speeches, Dana gave out lists of employees' names and home addresses, gagged its supervisors and the UAW conducted home visits. In response to employee inquiries about revoking previously signed authorization cards, UAW officials told employees that the only way to revoke their cards was for union organizers to personally visit them at their homes. In short, these employees have not been respected in their congressionally- granted "right to refrain." To the contrary, they have been subject to a concerted campaign to force them to sign union cards, whether they wish to or not.

Unfair labor practice charges were filed in these cases on or about December 15, 2003. Despite the clear record in these cases, the Regional Director dismissed the charges and, on appeal, NLRB's General Counsel has to this day failed to take any action. These and several related Dana-UAW cases remain pending, while the employees are in limbo despite having made their choice against UAW representation.

Thankfully, however, the full NLRB has begun to take action against this sort of abusive conduct. They have done so by granting review in three decertification cases, *UAW and Dana Corp.* and *Metaldyne Precision Forming/UAW*, 341 NLRB No. 150 (June 7, 2004) (cases consolidated for purposes of decision), and *United Steelworkers of America and Cequent Towing Products (Goshen, IN)*, NLRB Case No. 25–RD–1447.

In the *Dana* and *Metaldyne* cases, the facts are as follows: Dana and the UAW became parties to a secret "neutrality agreement" in August, 2003. Even though Dana employees in Upper Sandusky are the targets of the agreement, the terms of the agreement were kept secret from them prior to Dana's declaration of "voluntary recognition." (*See* Declaration of Clarice K. Atherholt, and Ex. 2 thereto). Local management at Dana Upper Sandusky was gagged, and not allowed to inform any employees about the details of the neutrality agreement. Employees were told only that the UAW union organizers would have wide access to employees' personal information and the plant.

Several months ago, apparently pursuant to the neutrality agreement, UAW organizers came in force to the Dana Upper Sandusky plant, and have stayed there ever since. Dana management held a series of company-paid captive audience meetings at the plant, praising its new "partner." At these meetings, officials from Dana Corporation in Toledo and UAW officials from Detroit told the employees that the UAW and Dana were now "partners," and that this partnership would be beneficial in getting new business from the Big Three into the plant. With a wink and a nod, the implication was that Dana Upper Sandusky would lose work opportunities or jobs if employees did not sign cards and bring in the UAW. (*Id*).

The UAW's "card check" drive that followed was the antithesis of an NLRB secret-ballot election. UAW organizers did everything they could to harass, coerce and pressure employees into signing union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them at work, and repeatedly call and visit them at home. UAW organizers also misled many employees as to the purpose and finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back. (*Id*). (This is hardly conduct that would be allowed if formal objections were raised in the context of an NLRB secret-ballot election, which requires "laboratory conditions"). This coercive effort culminated on or about December 4, 2003, when Dana suddenly announced that the UAW was "chosen" as exclusive representative of the Upper Sandusky employees, based upon a count of signed authorization cards. There was no vote and no secret ballot election.

Within days of this "voluntary recognition," over 35 percent of Clarice Atherholt's fellow workers signed her decertification petition. The Regional Director of the

NLRB dismissed that petition, but the full NLRB has now granted review. 341 NLRB No. 150 (June 7, 2004).

The facts in the companion cases, *Metaldyne Precision Forming*, Case Nos. 6-RD-1518 and 6-RD–1519 are very similar, except that within days of the "voluntary recognition," more than 50 percent of the covered employees signed decertification petitions. Again, a Regional Director of the NLRB dismissed those petitions, but the full NLRB has now granted review. 341 NLRB No. 150 (June 7, 2004). In all of these cases, employees' fate is now in the hands of the NLRB, where all they seek is a secret-ballot election to ensure their right to choose or reject a union free from coercion and harassment.

CONCLUSION

None of the abusive situations outlined herein, which are just the tip of the iceberg, would be happening if the National Labor Relations Act required secret ballot elections, and outlawed union "recognition" via coercive "card checks." Since the touchstone of the NLRA is employee free choice, good faith and fairness requires that employees be given the right to have a true secret ballot election conducted under laboratory conditions.

I trust these hearings will shed further light on the abuses inherent in "neutrality and card check" processes.

Senator SPECTER. Thank you very much, Mr. Taubman. The testimony so far has touched on the issues of coercion and intimidation. I think it would be useful before raising questions with the panel to hear from the three employees who have some specific facts to testify about. Keep your seats. We're just going to ask them to join you and we will hear from them and they will shed some additional light factually on some of the issues raised and we'll proceed from there.

Our next three witnesses are Ms. Clarice Atherholt, Ms. Arlene Brockel, and Ms. Josephine Ruckinger. We'll start first with Ms. Atherholt, an employee of the Dana Corporation, a non-union automotive firm from Toledo, Ohio. She lives in Sandusky, is married with two children and five grandchildren.

Thank you for joining us, Ms. Atherholt. Go forward with your testimony.

STATEMENT OF CLARICE ATHERHOLT, EMPLOYEE, DANA CORPORATION

Ms. ATHERHOLT. Good afternoon, Senator Specter, ladies and gentlemen.

Senator SPECTER. Pull that machine closer, too. Thank you.

Ms. ATHERHOLT. Thank you for giving me the opportunity to describe the ordeal that my co-workers and I faced immediately after my employer, Dana Corporation, cut a deal last year with the United Auto Workers that we would be unionized.

When my marriage ended in 1985, I knew that I needed to get back into the workforce to support my two children. During our married life, my husband was a truck driver and part of that time was spent in a union environment. He didn't want to join a union, but in order to drive he had no choice. Other than paying monthly union dues, the union never did a thing for him.

I knew that I did not want to work where there was a union, so I purposely did not apply where there were unions. In May 1985, I was hired by Continental Hydraulic Hose in Upper Sandusky, Ohio. We then were sold to Echlin, Inc. and approximately 6 years ago we were bought out by Dana Corporation.

Suddenly, in August 2003, we were informed that Dana and the UAW had signed something they called a neutrality agreement

which targeted employees not only in our Upper Sandusky plant but many other Dana plants. Despite our complaints, the agreement was kept secret from us. Our local management was not allowed to inform any of us about the specifics, but we learned that a main provision was that we would not be permitted to vote in a secret ballot election.

Once this backroom deal went into effect, UAW organizers obtained not only the names of all employees, but also addresses and phone numbers. As my views were well known, UAW organizers did not come to my home to harass me, but they did go to the homes of many of my friends, sometimes not just once, but two, three and even four unsolicited home visits. Each time they were soliciting signatures on union authorization cards and seemed unwilling to take no for an answer.

In November, we were strongly encouraged for our own benefit to attend a captive audience speech. The company said it had a new partnership with the UAW and that this partnership would be beneficial to us in getting new business from the Big Three. The implication was that our plant would lose business if we did not sign union cards and bring in the UAW.

One question that was asked of Mr. King, who is the UAW vice-president in charge of organizing, was what can the union guarantee us? He had no answer. But someone in the audience replied, they'll take 2 hours pay a month.

The organizers continued to make home visits as well as hanging out in three break areas at work. They interrupted private conversations among friends and made general nuisances of themselves. I believe that the organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees did sign the cards just to get the organizers off their back, not really because they wanted to be represented by the union.

On December 4, 2003, an announcement was posted on the bulletin Board stating the UAW was now bargaining representative for our plant. We were never told who the third party was that tabulated the cards, but rumor had it that 50 percent plus five cards had been signed and two or three of those cards were supposedly voided.

Many fellow employees do not want to be represented by the UAW or any other labor union. That's why I, on my own time, secured 68 signatures out of approximately 182 eligible employees on decertification petitions. That is over the required 30 percent to trigger an election. I filed these with the Cleveland regional office of National Labor Relations Board on January 2 of this year.

Much to our chagrin, the regional office rejected our request that would allow us once and for all to vote in a secret ballot vote on whether or not to unionize. The National Labor Relations Board in Washington, D.C. is reviewing the case, along with a similar petition filed by more than a majority of employees at Metaldyne in St. Marys, Pennsylvania.

I am here today because I strongly believe that it is wrong to declare the UAW our representative when we haven't had a secret ballot vote. And I'm running out of time.

PREPARED STATEMENT

After Mr. Miller, who is sponsoring the HR bill, he and several of his colleagues sent a letter to the government of Mexico demanding the use of secret ballot elections. Quoting from his letter, "absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose." And that is attached as Exhibit 1.

Senator Lindsey Graham has recently introduced a counter-bill to the S. 1925. It is S. 2637. And I am very grateful for that. And thank you for allowing me to be here.

[The statement follows:]

PREPARED STATEMENT OF CLARICE ATHERHOLT

Good Afternoon Senator Specter, Ladies, and Gentlemen. Thank you for giving me the opportunity to describe the ordeal that my coworkers and I faced immediately after my employer, Dana Corporation, cut a deal last year with the United Auto Workers that we would be unionized.

When my marriage ended in 1985, I knew that I needed to get back into the work force to support my two children. During our married life, my husband was a truck driver and part of that time was spent in a union environment. He didn't want to join a union, but in order to drive, he had no choice. Other than paying monthly union dues, the union never did a thing for him.

I knew that I did not want to work where there was a union, so I purposely DID NOT APPLY where there are (were) unions. In May 1985, I was hired by Continental Hydraulic Hose in Upper Sandusky, Ohio. We then were sold to Echlin, Inc. and approximately 6 years ago we were bought out by Dana Corporation.

Suddenly, in August 2003, we were informed that Dana and the UAW had signed something they called a "neutrality agreement" which targeted employees not only at our Upper Sandusky plant, but many other Dana plants. Despite our complaints, the agreement was kept secret from us. Our local management was not allowed to inform any of us about the specifics, but we learned that a main provision was that we would not be permitted to vote in a secret ballot election.

Once this backroom deal went into effect, UAW organizers also obtained not only the names of all employees, but also addresses and phone numbers. As my views were well known, UAW organizers did not come to my home to harass me, but they did go to the homes of many of my friends. Sometimes not just once, but 2, 3, and even 4 unsolicited home visits per person. Each time they were soliciting signatures on union authorization cards and seemed unwilling to take "no" for an answer.

In November, we were strongly encouraged "for our own benefit" to attend a "captive audience" speech. The company said it had a new partnership with the UAW and that this partnership would be beneficial to us in getting new business from the Big Three. The implication was that our plant would lose jobs if we did not sign union cards and bring in the UAW.

One question that was asked of Mr. King, who is the UAW Vice President in charge of organizing, was "what can the union guarantee us." He had no answer, but someone in the audience replied, "they'll take 2 hours pay a month."

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On December 4, 2003, an announcement was posted on the bulletin board stating the UAW was now the bargaining representative for our plant. We were never told who the third party was that tabulated the cards, but rumor had it that 50 percent plus 5 cards had been signed. And 2 or 3 of those were supposedly voided.

Many fellow-employees do not want to be represented by the UAW or any other labor union. That's why I, on my own time, secured 68 signatures out of approximately 182 eligible employees on decertification petitions. That is over the required 30 percent to trigger an election. I filed these with the Cleveland regional office of National Labor Relations Board on January 2, 2004. Much to our chagrin, the regional office rejected our request that would allow us, once and for all, to vote in a secret ballot vote on whether or not to unionize. The National Labor Relations

Board in Washington, D.C. is reviewing this case along with a similar petition filed by more than a majority of employees at Metaldyne, in St. Marys, Pennsylvania.

I am here today because I strongly believe that it is wrong for Dana management to declare that the UAW was our representative without a secret ballot vote. If the UAW really believes that it has the support of a majority of employees, then it has nothing to fear by giving employees a chance to vote.

What would happen to our country IF secret ballot elections were eliminated for public offices? This would reduce America to the status of a petty tyranny. Is this REALLY the direction we want to go in our country?

I think it's an outrage that Senator Ted Kennedy and George Miller would introduce legislation that would force all employees in America to be unionized through the unfair and coercive card-check process that we experienced at Dana. And this is after Mr. Miller and several of his congressional colleagues sent a letter to the government of Mexico demanding the use of secret ballot elections in all union recognition elections in that country because they are, and I quote, "absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose." (I've attached this letter to my testimony as Exhibit 1.)

On the other hand, I am very grateful to Congressman Charlie Norwood for introducing H.R. 4343, THE SECRET BALLOT PROTECTION ACT, into legislation and am pleased that I was a participant at a press conference on May 12 of this year when he publicly announced it. And I just learned that Senator Lindsey Graham introduced a similar bill in the Senate.

Again, Senator Specter, thank you for allowing me to be here today and a special thank you to Glenn Taubman, my attorney at the National Right to Work Legal Defense Foundation, who is providing us with free legal assistance in reclaiming our freedoms.

Senator SPECTER. Thank you very much, Ms. Atherholt. Our next witness is Ms. Arlene Brockel, former employee of B. Braun, a medical supply manufacturing company. She was involved with the U.S. Steel campaign to form a union at the B. Braun facility. Thank you for joining us, Ms. Brockel, and we look forward to your testimony.

STATEMENT OF ARLENE BROCKEL, FORMER EMPLOYEE, B. BRAUN, ON BEHALF OF THE UNITED STEELWORKERS OF AMERICA, AFL–CIO

Ms. BROCKEL. My name is Arlene Brockel and I worked as an assembler of B. Braun, Bethlehem, Pennsylvania, a leading manufacturer of disposable medical supplies, for almost 20 years. B. Braun employs more than 900 workers in Bethlehem, Allentown and Breinigsville, Pennsylvania. Most of the employees at B. Braun are middle-aged women. Currently, I own and manage my own chocolate shop in Bethlehem.

Thank you for inviting me to testify today. Senator Specter, I would like to start off by thanking you. I really appreciated the fact that you took the time to write a letter to the National Labor Relations Board inquiring about the labor law violations committed by B. Braun and a letter supportive of our campaign that you sent to myself and several co-workers.

After offering B. Braun many years of service, I was extremely frustrated by the way my co-workers and I were being treated. The whole way the company operated was to create an environment where workers were yelled at publicly when they made minor mistakes. Raises and promotions were based on favoritism and were very inconsistent. Supervisors used favoritism to pit workers against one another and we were facing across-the-board pay cuts. That is why in 2001 several of my co-workers and I decided to form a union with United Steelworkers of America.

After a strong majority of the workforce of 900 signed cards indicating the desire to form a union, we presented these signatures to the company, asking for recognition of our union. The level of enthusiasm for our union was extremely high. After the company refused to recognize our majority, we filed for an election with the National Labor Relations Board.

The company responded by hiring a notorious anti-worker firm, the Burke Group, and immediately began an organized campaign to intimidate, harass and coerce workers who had already indicated their desire to form a union on cards. Consultants at the plant representing this firm referred to themselves as Board of Labor Relations consultants, deliberately leaving the impression among my coworkers that they were government officials.

It began when the company started sending us literature from our supervisors to our homes. Before long, the cafeteria television began looping anti-union videos all day long, anti-union signs were hung up everywhere, and they began unannounced searchs of our lockers, and the company held picnics and other events to try to sway favor.

The tactics began to escalate dramatically. Before long, we were forced to endure repeated threats from our direct supervisors, often warning us that the company will move down south and close within 5 years if we voted to form a union.

Supervisors made workers sit in mandatory group meetings that would last for hours at a time. They held so many of these meetings we wound up working seven days a week just to make up the production time that we lost. At the meetings, union supporters were singled out for public harassment and humiliation. The company would show us anti-union videos of violent strikes and tell us the company would go out of business with a union. High-profile managers would give lengthy one-sided presentations against our efforts.

I was told that if we successfully formed a union, we would lose several vacation days, health care, and other benefits, and they would not guarantee any changes in our wages.

This organized campaign by the employer had a devastating effect on worker morale and created such a hostile work environment that many workers from each side still do not talk to this day. By the election, all energy, effort and momentum had been drained and we suffered a crushing defeat, losing by several hundred votes.

We filed charges with the National Labor Relations Board, but in the end all the company had to do was put a notice up in the workplace.

PREPARED STATEMENT

This was not like any other election I have ever participated in in America and no worker at the plant was able to make a free and fair decision under that kind of pressure.

We had already demonstrated our majority on cards and that decision must be honored. After the vote, I decided that after almost 20 years of service, I could no longer work in this type of environment, so I decided to leave and start my own business. Thank you for the opportunity to be here.

[The statement follows:]

PREPARED STATEMENT OF ARLENE BROCKEL

My name is Arlene Brockel, and I worked as an assembler of B. Braun Bethlehem, PA, a leading manufacturer of disposable medical supplies, for almost 20 years. B. Braun employs more than 900 workers in Bethlehem, Allentown and Breinigsville, PA. Most of the employees at B. Braun are middle-aged women. Currently, I own and manage a candy and chocolate store in Bethlehem.

Thank you for inviting me to testify today.

Senator Specter, I want to start off by thanking you. I really appreciated the fact that you took the time to write a letter to the National Labor Relations Board inquiring about labor law violations committed by B. Braun and a letter supportive of our campaign that you sent to myself and several of my co-workers.

After offering B. Braun many years of service, I was extremely frustrated by the way my co-workers and I were being treated. The whole way the company operated was to create an environment where workers would be yelled at publicly for making minor mistakes; raises and promotions were based on favoritism and were inconsistent; supervisors used favoritism to pit workers against one another, and we were in the process of facing across-the-board cuts in pay. That is why in 2001, several of my co-workers and I decided to form a union with the United Steelworkers of America.

After a strong majority of the workforce of 900-signed cards indicating the desire to form a union, we presented these signatures to the company asking for recognition of our union. The level of enthusiasm for our union was extremely high. After the company refused to recognize our majority, we filed for an election with the National Labor Relations Board.

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It began when the company started sending us literature from supervisors to our homes. Before long, the cafeteria televisions began looping anti-union videos all day long, anti-union signs were up everywhere, they began unannounced searches of our lockers, and the company held picnics and events to try and sway favor.

The tactics began to escalate dramatically. Before long, we were forced to endure repeated threats from our direct supervisors, often warning us that the company will move down South and close within five years if we voted to form a union.

Supervisors made workers sit in mandatory group meetings that would last for hours at a time. At the meetings, union supporters were singled out for public harassment and humiliation. The company would show us anti-union videos of violent strikes, and tell us the company would go out of business with a union. High-profile managers would give lengthy one-sided presentations against our efforts.

I was told that if we successfully formed a union, we would lose several vacation days, health care and other benefits, and they would not guarantee any changes in our wages.

This organized campaign by the employer had a devastating effect on worker morale and created such a hostile environment that many workers from each side still do not speak to each other to this day. By the election, all energy, effort and momentum had been drained, and we suffered a crushing defeat, losing by several hundred votes. We filed charges with the National Labor Relations Board—but in the end all the company had to do was put up a notice in the workplace.

This was not like any other kind of election I have ever participated in America, and no worker at the plant was able to make a free and fair decision under this kind of pressure and threat.

We had already demonstrated our majority on cards, and that decision must be honored. After the vote, I decided that after almost 20 years I could no longer work in this type of environment, and so I decided to leave and start my own business.

Thank you for the opportunity to be here today.

Senator SPECTER. Thank you, Ms. Brockel. Thank you very much. We now turn to Ms. Josephine Ruckinger, Certified Nursing Assistant at the Presbyterian Home, Hollidaysburg, Pennsylvania, and a member of the Service Employees International Union. Thank you for joining us, Ms. Ruckinger, and we look forward to your testimony.

STATEMENT OF JOSEPHINE RUCKINGER, CERTIFIED NURSING ASSISTANT AT PRESBYTERIAN HOME OF HOLLIDAYSBURG, PA, ON BEHALF OF THE 1199P SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO

Ms. RUCKINGER. Thank you, Senator. Good afternoon. My name is Josephine Ruckinger. I'm a Certified Nurse's Aide with the Presbyterian Home of Hollidaysburg, a member of SEIU. I have worked for the Presbyterian Home for 7½ years and as a nurse's aide for over 12 years. I'm a registered Republican and a licensed gun owner who enjoys activities such as canoeing and camping. And I care for my grandmother, who is 77, and she has moved in with me and my husband after having a stroke and numerous health problems.

Presbyterian Home provides long-term care for 150 elderly residents. And thank you for inviting me today. I work on a unit where I am responsible for nine patients who require direct care in all daily living activities, eating, dressing, bathing and toileting. Many of my patients suffer from dementia and Alzheimer's. I work hard and care about my patients, but it's hard work. Many of my patients can be combative or require lifting and turning, which I often have to do alone.

When management changed at Presbyterian Home in 2001, the new management started making changes to our working conditions. Our nursing director of over 20 years left. She was fed up and quit because of the new administrator. It was because of new management who didn't seem to care about us that caused us to form a union.

During our campaign, management required all staff to attend mandatory in-service meetings. These meetings were held in the afternoon, so if it was your day off or you weren't working until night, you would come in on your own time. We have three shifts. The meetings were held in the afternoon and all workers were required to attend, even on our days off or when you were not yet on shift. We have three shifts, so workers had to come in to attend these meetings even if they were not due to report until 11 o'clock that night. They made us come to work to hear management's viewpoints about our union, and the union wasn't allowed to attend these meetings, these mandatory meetings.

At one of those meetings a manager said we should not open our doors to SEIU because while we were talking to them at our front door someone could come into our back door and rob our homes. This was because we were doing home visits of workers, which is the only way we can talk to each other without management watching. Management told us the union would only take our money and dues and couldn't do anything for us.

Management also held meetings with personal care residents to scare the residents. They told the residents their rent would go up and the union would protect bad workers. The administrator told one of my co-workers she would do anything to keep the union out, even if it meant harassment by residents toward staff. On one occasion a resident began to yell at one of my co-workers that he could not afford to continue to live there if his rent went up.

They told us we would never get a first contract, and if we voted for the union we would lose our pension plan and other benefits.

They told us we would have to start from scratch and we would never get the things we have in our first contract.

My co-workers and I did not like what management was saying, but we could not invite the union to attend and give their side of the story.

We were finally able to vote in May 2002, but the Home challenged our ballots and the National Labor Board kept the ballots for over 1 year before we knew the results of our election. We found out that we won the election in 2003. We have not been able to get our first contract, just as management had said.

Unfortunately, our LPNs lost their election, and one of my LPN co-workers was pulled aside by her supervisor and told her to keep her nose clean, you know, to stay out of it, because she supported the union.

I was disciplined and lost 3 days pay. One of my residents is very combative. I had asked management repeatedly that I needed another worker to help me with this resident. But we all have nine to ten residents and we can't always help each other. I was trying to brush the resident's teeth and she tried to hit me in the face. When I ducked to avoid being hit, she hit her hand against the closet door and received a cut to the back of her hand.

I reported this immediately to my nursing supervisor and we wrote a report. No one blamed me for the resident's injury at the time, because everyone knew this resident could be dangerous. I worked for 8 days after the incident taking care of this resident and then I was called into my administrator's offices and suspended for 3 days without pay. My administrator told me there is no policy against staff being abused.

PREPARED STATEMENT

I had to write letters to the administrator complaining about being disciplined for something that was not my fault. Because I don't have a union, I had to do this myself. If we had a union, I would have had someone to help me protect my rights and ensure my patients received quality care.

Thank you. I'm running out of time. But thank you for hearing me today and I hope I have a job to go back to tomorrow after being here today.

[The statement follows:]

PREPARED STATEMENT OF JOSEPHINE RUCKINGER

My name is JOSEPHINE RUCKINGER I am a Certified Nursing Assistant (CNA) at the Presbyterian Home of Hollidaysburg, PA and a member of the Service Employees International Union 1199P. I have worked at Presbyterian for seven and a half years, and have worked as a CNA for over 12 years. I am registered Republican and enjoy target practice and am a licensed gun owner who enjoys other outdoor activities such as canoeing and camping. I care for my grandmother who is 77 years old and lives with me after a stroke. Presbyterian Home provides long-term care for 150 elderly patients.

Thank you for inviting me to testify today.

I work on a unit where I am responsible for nine patients who require direct care in all daily living activities, eating, dressing, bathing and toileting. Many of my patients suffer from dementia and Alzheimer's disease. I work hard and care about my patients, but it is very hard work. Many of my patients can be combative or require lifting and turning, which I often have to do alone.

When management changed at Presbyterian around 2001 the new management starting making changes to our working conditions. Our nursing director of over 20

years got fed-up and quit, because of the new administrator. It was because of new management who didn't seem to care about us, that caused us to look to join a union.

During our campaign to join the Service Employees International Union 1199P, management required all staff to attend mandatory in-service meetings. These meetings were held in the afternoon and all workers were required to attend, even on our days off or when we were not yet on shift. We have three shifts, so workers had to come in to attend these meeting even if they were not due to report to work until 11 p.m. at night. They made us come to work to hear management's view about our union. We were not able to ask questions or speak, and the union was not allowed to attend.

At one of these meetings a manager said we should not open our doors to SEIU, because while we were talking to them at our front door, someone could come in our back door and rob us. This was because we were doing home visits of workers, which is the only way we can talk to each other, without management watching. Management told us the union would only take our money in dues and could not to anything for us.

Management also held meetings with personal care residents to scare residents, they told the residents their rents would go up and the union would protect bad workers. The administrator told one of my co-workers she would do anything to keep the "union out" even if it meant the residents harassing staff. On one occasion a resident began to yell at one of my co-workers that he could not afford to continue to live there if his rent went up.

They told us we would never get a first contract, and if we voted for the union we would lose our pension plan and other benefits. They told us we would have to start from scratch and we would never get the things we have now in a first contract.

My co-workers and I did not like what management was saying, but we could not invite the union to attend to give their side of the story.

We were able to finally vote for the union in May 2002, but Presbyterian challenged our ballots and the Nation Labor Relations Board kept the ballots for over a year before we knew the results of our election. We finally found out that we won the election in May 2003. We have not been able to get a first contact, just as management threatened us.

Unfortunately, our licensed practical nurses (LPNs) lost their election 7 to 5, and one of my LPN co-workers was pulled aside by her supervisor. The supervisor told her she should "keep her noise clean" because they knew she supported the union.

I was disciplined and lost three (3) days pay. One of my residents is very combative. I had asked management repeatedly that I needed another worker to help me with this resident. But we all have 9 to 10 residents and we can't always help each other. I was trying to brush this resident's teeth and she tried to hit me in the face, when I ducked to avoid being hit, she hit her hand on a closet door and cut the back of her hand. I reported this immediately to my nurse supervisor and we wrote a report. No one blamed me for the resident's injury at the time because everyone knew this resident could be very dangerous.

I worked for eight (8) days after the incident, and then all of a sudden I was suspended for three days without pay. When I was called into the administrator's office, she told me I should have let the resident hit me, because there is no policy against staff abused. I had to write letters to the administrator complaining about being disciplined for something that was not my fault. Because I don't have a union I had to do this myself. If we had our own union, I would have someone to help me protect my rights and ensure my patients received quality care. Because we work alone, we are always at risk of a resident making a complaint against us. We try to care for our residents but, they sometimes do things that are not in their control. We can lose our jobs or pay as a result. Workers don't feel secure or safe at work in these situations. I was finally reimbursed for two (2) days pay, but it is still in my file and I lost one day of pay.

This has happened before with this resident, and no one has been disciplined. But because I supported the union management used me as an example. After this incident, this resident was put on a two person order, which is what should have happened all along.

I need and want a union, so I can have a safer work place. We need more staff so we don't have to care for the residents alone.

I pay $108 every two weeks for my health insurance for my husband and myself. I make $9.22 per hour, because I work the evening shift and get a $.35 cents shift differential. Presbyterian does not provide us with uniforms, we have to buy those ourselves.

Thank you for listening to my story. I wish all my co-workers could come here today and tell you their stories. We all have them. We like our jobs and our residents, but we need a union to help us. I also hope that when I go back I will have a job, because I came here today to testify.

Senator SPECTER. Thank you, Ms. Ruckinger. If you don't, call me.

Ms. RUCKINGER. Thank you.

Senator SPECTER. Ms. Connelly, you had referenced a medical center in Wilkes-Barre where you had used the term "union busters." Factually, what happened in that situation?

Ms. CONNELLY. There's actually a few hospitals. The one I was referring to was at Geisinger Wyoming Valley Medical Center. We'll name the institution. And I think we organized them maybe in, this is 2004, it may have been, 2000, 2001. And they hired the Burke Group, which is the same group that is being discussed by the Steelworkers.

I would like to, if I may, Senator, submit additional testimony on the Burke Group, to give you some further background. It just so happens that it's the same company that came in and ran these campaigns.

[The information follows:]

[From the New Labor Forum, Summer 2004]

THE FINE ART OF UNION BUSTING

(By John Logan)

The firm that is the focus of this article is not a "Bad" employer in the traditional sense. Its clients are normally extremely satisfied with its service. Indeed, it may well be, as it frequently claims, the nation's leading company providing this particular service. Among its hundreds of satisfied clients over the past two decades are General Electric, MCI, K-Mart, Honeywell, Coca-Cola, and several large hospital chains, including Catholic Healthcare West, the largest private hospital chain in California. According to all available information, moreover, the firm treats its employees extremely well—most are handsomely rewarded for their efforts, earning around $180–$250 per hour plus expenses in compensation.

The problem with this firm is the service it provides—sophisticated and aggressive antiunion campaigns that are custom designed to undermine employees' right to choose a union. While it is probably unfamiliar to many scholars of labor-management relations, the firm is intimately familiar to union organizers throughout the country who rank it alongside New York lawyers Jackson-Lewis as one of the most notorious union-busting firms in the nation. The firm has orchestrated approximately 800 antiunion campaigns since its founding in 1981, charging millions of dollars (including state and federal tax dollars from employers that receive public money)[1] for its services, and has been involved in dozens of organizing drives tarnished by allegations of unfair labor practices (ULPs). The name of the firm is the Burke Group.

Modern day antiunion consultants have operated since the 1940s. However, the consultant industry expanded enormously in response to the intensification of employer opposition to unionization during that decade.[2] By the 1990s, one scholar estimated, American employers were spending over $200 million per year in direct payments to consultants, but that the true value of the antiunion industry rose to over $1 billion per year when one included the cost of management and supervisor

[1] In one infamous case involving numerous unfair management practices, Catholic Healthcare West paid the Burke Group over $2.6 million to fight SEIU organizing campaigns in Sacramento and Los Angeles in 1998, according to the hospital chain's own financial records. That same year, Catholic Healthcare West received over $40 million in state funds in the form of Medi-Cal reimbursements.

[2] "Pressures in Today's Workplace. Oversight Hearings Before the Subcommittee on Labor-Management Relations of the House of Representatives Committee on Education and Labor," 96th Congress (1980).

time off to fight unionization.[3] Recent studies have demonstrated that antiunion consultants are now part of standard operating procedure, with three-quarters of employers engaging their services when confronted by an organizing drive, and that unions win significantly fewer National Labor Relations Board (NLRB) elections when employers engage the services of a consultant.[4] Over the past three decades, consultant activities have transformed the character of union representation campaigns, turning them into significantly more acrimonious affairs. Prior to the 1970s, tactics such as captive speeches, employee interrogations, one-on-one meetings between employees and supervisors, "vote no" committees, antiunion videos, threats of plant closures, and discriminatory discharges were used sparingly by employers facing organizing campaigns. In recent decades, in contrast, these tactics have become commonplace, in part because of their development and promotion by consultants.[5]

Today, the Burke Group, headquartered in Malibu, California, perhaps best personifies the modern face of antiunion consulting. With over 60 full-time consultants, it is probably the nation's largest firm specializing in counterorganizing campaigns.[6] The Burke Group advises employers throughout the country on how to maintain their "union-free advantage" and operates in most sectors of the economy. The firm's consultants live in 23 different states, thus allowing it to dispatch consultants "quickly and efficiently to any trouble spot." [7] In recent years, the Burke Group has specialized in healthcare campaigns and campaigns involving multicultural and multilingual workforces, both areas of significant new organizing activity. It can credibly claim significant expertise in healthcare labor relations. Its extensive consultant roster includes eight former healthcare industry executives, five registered nurses, and one former president of the California Nurses Association, Susan Harris, who led the nurses' union for two years in the early 1980s.[8]

In the 1970s and 1980s, antiunion consulting was an overwhelmingly white, Anglophone business, and few firms employed multilingual or minority consultants. Since the 1990s, however, many large consultant firms have diversified their workforce, as counter-organizing campaigns involving immigrant workers have come to constitute a significant portion of their workload.[9] The Burke Group is just one of a number of consultant firms in Southern California that specialize in counter-organizing campaigns involving immigrant workers. Others include Cruz & Associates, Labor Relations Consultants, Inc., and Hector Flores. But the Burke Group leads the field in diversity, with consultants fluent in Spanish, Portuguese, French, Filipino, Creole and several dialects of Chinese. As a result, the firm assures clients that it can now "more effectively respond to the challenges of an increasingly diverse workforce.[10]

The Burke Group has sought to internationalize its operations in recent years by offering its services in Canada and the UK, both of which have union recognition systems broadly similar to that of the United States. Unions in Ontario have reported greater consultant activity since the introduction of mandatory certification elections in 1995.[11] Burke Group clients in the U.K. include General Electric, Honeywell, Eaton Corporation, and Amazon.co.uk. Unlike their U.S. counterparts, British unionists are largely unfamiliar with antiunion consultants, and in several recent campaigns, unions have been unaware of the Burke Group's presence, even as they have watched employee support for unionization hemorrhage before their eyes. Following a five-year campaign to organize employees at General Electric Caledo-

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[3] John Lawler, Unionization and Deunionization (University of South Carolina Press, 1990).

[4] Kate Bronfenbrenner and Rob Hickey, "Changing to Organize: A National Assessment of Union Organizing Strategies." Paper presented at the Institute for Labor and Employment Research Conference on Union Organizing, UCLA, May 17, 2002.

[5] John Logan, "Consultants, Lawyers, and the Union Free Movement in the United States Since the 1970s," Industrial Relations Journal 33:3 (August 2002), 197–214.

[6] Antiunion law firms such as Jackson-Lewis are larger than the Burke Group, but these firms provide a range of legal services in addition to counter-organizing campaigns, and rarely conduct direct persuader activity.

[7] Labor Information Services (a.k.a., the Burke Group) web page at www.labor informationservices.com/ (March 5, 2003).

[8] On organizing in the healthcare sector, see Paul F. Clark, "Health Care: A Growing Role for Collective Bargaining," in Paul F. Clark, et al, eds., Collective Bargaining in the Private Sector (Industrial Relations Research Association Series, Champaign-Urbana, 2002), pp. 91–135.

[9] On organizing among immigrant employees, see Ruth Milkman, ed., Organizing Immigrants (Cornell UP, 2000).

[10] Labor Information Services web page at www.laborinformationservices.com/(March 5, 2003). The Burke Group files financial reports under the name, Labor Information Services, Inc.

[11] Charlotte Yates, "Staying the Decline in Union Membership: Union Organizing in Ontario, Union Busting New Labor Forum 89 1985–99," Relations Industrielles/Industrial Relations, 55:4, pp. 640–674.

nian, Britain's largest private-sector union, Amicus, lost decisively a representation ballot in June 2002. One bewildered union official remarked after the crushing defeat:

"We have been blown out of the water. . . . The result is a huge shock. We can't explain why our arguments for union recognition have been rejected. . . . It is quite obvious that those who said they would vote for us have changed their mind. God knows why." [12]

The GE campaign is not an isolated case. The former General Secretary of the Trade Union Congress, John Monks, criticized consultants for promoting a "dubious approach" to union recognition, one "far more suited to the aggressive nature of U.S. industrial relations." [13] However, aggressive consultant activity is still relatively uncommon in Britain and it remains to be seen whether it will become a standard feature of the union recognition process.[14]

THE BURKE GROUP AND THE CHINESE DAILY NEWS CAMPAIGN

Perhaps the best way to examine the full impact of the Burke Group's activities is through a detailed examination of its ongoing campaign at the Chinese Daily News (CDN) in Monterey Park, a suburb of Los Angeles. This campaign provides a textbook example of the strategies that have become standard features of consultant campaigns. The campaign offers additional evidence of the abject failure of the National Labor Relations Act (NLRA) to protect employees against the actions of aggressively antiunion employers. As the events at the CDN demonstrate, a firm that is resolutely determined to fight an organizing campaign, and possesses sufficient financial resources, can frustrate the democratic will of its employees for months or even years. Employers adeptly exploit the hearings process before the election, the appeals process after the election, and the NLRB's lengthy delays (and inadequate penalties) in remedying unfair management practices. The CDN and countless other firms like it have exploited the weaknesses of the NLRA to considerable success. As a result of overt employer opposition that continues after an election victory, over one quarter of certified unions fail to secure first contracts.[15] Fred Feinstein, General Counsel of the Clinton NLRB, recently warned that employees' ability to develop a successful collective bargaining relationship is "too often undermined by the potential of years of litigation that can follow a vote to unionize." [16] The CDN campaign provides a perfect illustration of Feinstein's comments. More than two years since they voted for unionization, the CDN employees are still without independent representation. The tribulations of the mostly Taiwanese employees are also symptomatic of more widespread problems affecting immigrant workers. Frequently isolated by cultural and linguistic barriers, they are especially vulnerable to coercion by antiunion employers who would deny their legal right to choose a union.[17]

The Chinese Daily News is the largest Chinese language newspaper in North America, with over 200 employees at four locations—Los Angeles (Monterey Park),

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[12] Amicus official quoted in "Aerospace workers vote against union recognition," The Evening Times (Scotland), June 4, 2002. Amicus lost the ballot, conducted by the Central Arbitration Committee (Britain's NLRB), by 449–243. In the UK, the Burke Group operates under the name, TBG Consulting.

[13] John Monks, General Secretary Trade Union Congress, letter to Keith James, Chairman, Eversheds, July 4, 2000.

[14] Trades Union Congress, "Recognition Deals Fall as U.S. Style Union-Busting Hits the UK," Press Release, February 16, 2004. In contrast with the NLRA, the UK Employment Relations Act encourages voluntary agreements between unions and employers and provides for certification based on documentary evidence of union membership. Thus, there exists significantly less opportunity for lengthy and aggressive consultant antiunion campaigns.

[15] Several studies have concluded that unions are significantly less likely to secure a first contract when a consultant is present. Consultants encourage employers to believe that they haven't "lost" an organizing campaign until they sign a contract with the union. In contrast, almost all unions that gain recognition as part of a "labor peace agreement" (limiting the conduct of both management and union during the organizing campaign) are able to negotiate first agreements. Richard Hurd, "Union Free Bargaining Strategies and First Contract Failures," in P. Voos, ed., Proceedings of the 48th Annual Meeting of the Industrial Relations Research Association (Madison, WI, 1996); Gordon Pavy, "Winning NLRB Elections and Establishing Collective Bargaining Relationships" in S. Friedman et al., eds., Restoring the Promise of American Labor Law (Cornell UP, 1994); Adrienne Eaton & Jill Kriesky, "Union Organizing Under Neutrality and Card Check Agreements," Industrial & Labor Relations Review 55 (2001).

[16] Fred Feinstein, "The Limits of Reform at the NLRB," Paper Delivered at UCLA Institute for Labor and Employment, November 15, 2002.

[17] On the obstacles faced by immigrant workers attempting to organize, see Milkman, Organizing Immigrants.

San Francisco, New York, and Toronto.[18] For the past quarter century, it has published a daily newspaper in Mandarin, which has a circulation of over 100,000. The newspaper's parent company, Taiwan's United Daily News, is fully unionized at home.[19] In October 2000, the paper's 152 employees at Monterey Park started an organizing campaign with The Newspapers Guild Communication Workers of America (TNGCWA) after management announced that, as part of a financial restructuring program, it would rescind a scheduled pay increase and require all employees to sign an "employment at will" declaration, allowing the paper to terminate their positions at any time. But employees' grievances predated the restructuring program. Employees complained that, for many years, management had forced them to work long hours with no overtime pay,[20] and had funded bonuses for top performers through reductions in pay for other workers. However, most employees believed that their noncitizenship status and limited command of English would prevent them from obtaining alternative employment. Normally reluctant to disobey their managers, 95 percent of the employees broke with cultural tradition and signed union authorization cards within a month of the start of the campaign. The union then requested that the company grant recognition based on the authorization cards, but management refused, stating that a secret ballot election was the only proper method of disclosing the true wishes of the employees. The newspaper's parent company appointed a new manager at the Monterey Park facility, and assured employees that he would deal with their grievances. Thus, management argued, the union had "already reached its goal."[21] In addition to addressing certain workplace problems, however, the new manager recruited the services of Burke Group consultant Larry Wong, who specializes in counter-organizing campaigns involving predominantly Asian or Pacific Island employees.[22] In a clear indication of who would be running the antiunion campaign, the new manager provided Wong with a "luxury suite" inside the newspaper building.[23] Although controlling overall strategy and conducting limited direct persuader activity (consultant-employee contact), Wong and other consultants have largely remained in the background, running the campaign through local management and supervisors.

Management immediately initiated an aggressive antiunion campaign. In an effort to exploit the cultural sensitivities of the workforce, the company publicly humiliated several union activists and interrogated employees about their loyalty to the company. The newspaper's attorneys delayed the representation proceedings at every opportunity, with the bargaining unit hearings alone taking over three months to complete.[24] Among other delaying tactics, management told the board that one quarter of the employees were in fact supervisors (and therefore excluded from the bargaining unit), thereby forcing vulnerable employees to testify about their work. It also argued that the Monterey Park workforce should be split into

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[18] In recent years, the Burke Group has developed a subspecialty in counter-organizing campaigns in the newspaper industry, which has been characterized by acrimonious labor-management relations. In addition to the Chinese Daily News, the Burke Group orchestrated pressroom campaigns at the LA Times and Orange County Register in 2002.

[19] Other companies that are unionized at home, but have hired the Burke Group in an effort to remain union free in their U.S. operations include the auto companies Daewoo Motors (unionized in Korea) and SAAB (unionized in Sweden). On the antiunion practices of foreign employers operating in the U.S., see William Cooke, "Union Avoidance and Foreign Direct Investment in the USA," Employee Relations, 23:6 (2001), 558–580.

[20] The Chinese Daily News is currently under investigation by the California Department of Labor's Division of Labor Standards Enforcement for alleged violations of state and federal wage and hour laws. CDN employees reported being cheated out of state-mandated overtime payments and instructed to falsify documents for inspectors.

[21] Chinese Daily News, "Fair is Fair" (no date).

[22] Larry Wong joined the Burke Group in 1985 after working in human resources in the banking and insurance industries. The Burke Group's consultant list states that Wong "has become increasingly involved in providing third party persuader services to companies with ethnically diverse work forces, particularly when the workforce has a large percentage of Asian/Pacific Islanders." "Burke Group Consultant Listing" (no date).

[23] Most antiunion campaigns are run entirely by consultants and select groups of top management. According to one leading practitioner, decisions made by these groups are "vitally important" and thus there is a "compelling need for secrecy." Russell J. Thomas, "A Managers Guide to Union Avoidance: Executive Summary." Available at: www.paradine.us/rjtlaborlaw/union.html (last visited September 5, 2002).

[24] Delaying the representation process is a standard consultant tactic. Consultants tell employers that time is on their side and recommend filing frivolous complaints with the NLRB that delay the election and prevent the expeditious enforcement of the law. One prominent "union avoidance" law firm recently advised that an employer should view the hearings process as "an opportunity for the heat of the union's message to chill prior to the election." Jackson-Lewis, "Time is on Your Side," union kNOw, Summer 2001.

seven separate bargaining units. The NLRB rejected management's arguments, and, in February 2001, finally set an election date, which would be held one month later.

The company then intensified its antiunion strategy. Management told employees that, if the union won, they would lose wage increases and that the plant might be forced to relocate to Taiwan. Managers and supervisors held captive group and one-on-one meetings with employees at all times of day and night, questioning them about their union sympathies and warning of dire repercussions, for both individual employees and the company as a whole, if the union were to prevail.[25] Management offered pay increases or promotions to employees who agreed to campaign against the union, and distributed negatives stories about TNG-CWA, while telling employees that it was illegal for them to discuss unionization at work. After the employees enlisted the support of local, state and national politicians, the paper's attorneys threatened to sue for slander lawmakers who had criticized its antiunion conduct. State Assemblywoman Jackie Goldberg, commented on the management's activities: "In its editorials, the newspaper says it supports America—but you cannot support America while violating its laws."[26]

The company's antiunion literature has stressed issues that have become standard features of consultant campaigns. It has accused the union of intimidating and lying to employees, injecting unnecessary confrontation into the workplace, and threatening the financial well being of the company and the job security of employees. In addition to these long-established consultant themes, CDN management has used culturally specific threats and appeals in its attempt to discourage employees from unionizing. Throughout the campaign, management has sought to exploit employees' loyalty to the paper and their concern for its reputation in a non-Asian community. It has publicly excoriated union supporters in company newsletters, and accused them of introducing confrontation that threatens to "destroy what we have achieved against insurmountable difficulties and is now proudly displayed in front of all other ethnic groups."[27] Management compared the union with China under Chairman Mao, and stated that visitors from China had commented on the organizing drive: "We saw these happenings so many times during the Cultural Revolution. This is just the same!" It accused organizers of attempting to silence procompany employees: "None of us wants to live under 'denouncement' as if we were in Mainland China. . . . How sad indeed for one to be in the United States, a free society and not dare to speak for oneself."[28] At one mandatory meeting, the firm's CEO, Duncan Wang, asked rhetorically, why would employees at a Chinese newspaper want to bring in American outsiders in the form of the union?[29]

But the company's thinly veiled threats did not produce the desired result. After a five-month long antiunion campaign orchestrated by Burke consultants, CDN employees voted 78–63 in favor of union representation, on March 19, 2001.[30] CWA officials stated that by supporting unionization the CDN employees had surmounted tremendous cultural and psychological barriers. Prior to the campaign, few employees had experience with unionization, and deference to managerial authority was deeply ingrained among the workforce. One reporter explained: "Culturally, the employer is perceived as a father who takes care of you."[31] The result is also noteworthy because the CDN employees are the first Chinese-language media employees in the country to vote to unionize.[32] Since the election, however, the company has

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[25] One-on-one meetings between supervisors and employees are probably management's most effective method of conveying its antiunion message, and because there are no witnesses to these meetings, it is difficult for the union to establish violations of the law, such as threats of reprisal or promises of benefit.

[26] Goldberg quoted in "Chinese Workers Rally Support," The Guild Reporter, April 26, 2002. Other politicians who have criticized the CDN campaign include Congressman Sherrod Brown, 90 New Labor Forum J. Logan Congresswoman Hilda Solis, State Senator Gloria Romero and Monterey Park Councilwoman (now State Assemblywoman) Judy Chu. In May 2002, the California State Assembly's Asian Pacific Islander Caucus and Labor Committee held hearings on the violation of immigrant workers' rights, including those at the Chinese Daily News.

[27] Chinese Daily News, "Fair is Fair," (no date).

[28] Ibid.

[29] Chinese Daily News, "Let Truth Speak," April 4, 2002; Chinese Daily News, "Fair is Fair," (no date).

[30] Although it expected a larger margin of victory, the union attributed the narrowness of the vote largely to the intensive antiunion campaign and believes that few of the employees are ideologically opposed to unionization.

[31] Lien-Yi Wang, quoted in "TNG Gain First Chinese-Speaking Unite," The Guild Reporter, April 20, 2001.

[32] The union has remained committed to the campaign because it represents one of its first successes in the "ethnic media," an increasingly important sector of U.S. media industry. TNG–CWA already represents workers in several Yiddish- and Spanish-language publications. The

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steadfastly refused to recognize the union. Undaunted by its election defeat, management appealed the result to the NLRB, claiming that at least one supervisor had made known her support for unionization, while management had "remained neutral" throughout the campaign. As a result, it argued, employees had gained the false impression that the company favored unionization.[33] At the same time that it professed neutrality to the NLRB, the company told employees that it was prepared to spend $1 million to avoid signing a contract with the CWA. To achieve this end, it has used every legal mechanism at its disposal to stall bargaining with the union for years, if necessary.

In June 2001, the company initiated a campaign of retaliation, eliminating the jobs of several prounion employees. In response, TNG–CWA has filed over 20 unfair labor complaints accusing management of coercive conduct. The company also filed objections to the legality of the election, and its attorneys ensured that NLRB hearings on its objections lasted for as long as possible. In August 2001, the regional NLRB upheld the election result, but the newspaper appealed its decision to the national labor board. Management accused the union of using a coercive corporate campaign to force the paper to cease contesting the validity of the outcome,[34] but warned that it "does not intend to be intimidated into giving up the legal right of its employees to a fair election." However, its determination to overturn the result did not end with the NLRB. The company announced that, if the board were to uphold the result, it would "proceed to the Court of Appeals for an ultimate determination on the validity of the election," thereby prolonging the process for several more months or years.[35] In July 2002, the regional labor board postponed hearings on several ULP complaints until after the national NLRB ruled on the legality of the election. At the time of writing, the national board has yet to announce its decision. Even if the NLRB were to uphold the result, however, management will likely continue its campaign of delay, intimidation and harassment. After leaving her position at the newspaper, CDN reporter Hsiao-tse Chao described the intensity of the Burke Group campaign:

"It was political terror. . . . The majority of the employees thought that their phones were tapped. They talked about hidden cameras in the corners. I thought this was a democratic country. You [should be able] to exercise the right to organize—successful or not."[36]

In November 2002, shortly before awarding employees' annual bonus (which can account for up to 10 percent of their total salary), management circulated a petition stating that employees no longer desired unionization. Not surprisingly, having witnessed the victimization of union activists, and having lost confidence in the ability of the NLRB to protect their freedom of association, three-quarters of the employees signed the employer petition. CDN management then submitted the petition to the board, asking it to dismiss the CWA's request for certification.

CWA's broadcasting wing (NABET) has won organizing victories in outlets of Spanish-language TV giant Univision and at a Korean language radio station. The campaign also marks the first time that the TNG–CWA has hired a Chinesespeaking organizer—a former CDN reporter. Although the ethnic media is as profitable as other sections of the media, employees in this rapidly growing sector are often paid significantly less and labor under worse conditions than other media employees. International Year Book: The Encyclopedia of the Newspaper Industry: Part Two—Weeklies (Editor & Publisher, 2000).

[33] The union claims that the small number of contested votes would not affect the outcome of the election. However, management maintains that, given the strong respect for authority in Chinese culture, the open support for unionization among supervisory personnel made a fair election impossible. Allegations that supervisors voted, or otherwise improperly participated, in NLRB elections are standard features of consultant campaigns in which unions win the ballot.

[34] The union has conducted a vigorous international campaign in support of the workers' freedom of association. In July 2002, the TNG–CWA led a delegation of CDN employees and leaders from the Asian-American labor community to meet with lawmakers and union leaders in Taiwan. As a result of these meetings, legislators and labor leaders in Taiwan have criticized the United Daily News. The campaign has also become a cause célébre for journalists unions around the globe and has attracted support from Union Network International and the International Confederation of Free Trade Unions. The TNG–CWA has also organized a worldwide e-mail campaign to protest the company's refusal to recognize the election result.

[35] Steven D. Atkinson, Atkinson, Adelson, Loya, Ruud & Romo (CDN lawyers), Re: Chinese Daily News (no date). In recent decades, employers that lose at the NLRB have demonstrated an increasing disinclination to accept NLRB decisions as the "final word" on election disputes, believing, quite correctly, that they have a greater likelihood of success at the federal courts. See James Brudney and Deborah J. Merritt, "The Influence of Appellate Judges' Social Backgrounds When Reviewing NLRB Decisions," 2 Employee Rights Quarterly 13 (Spring 2002).

[36] Quoted in Ji Hyun Lim, "Chinese American Newspaper Disputes Unionization," Asian Week, January 10, 2003. Available at www.asian week.com/2003__01__10/bay__newspaper.html (last visited May 5, 2003).

The immediate financial costs of the newspaper's antiworker campaign have been considerable, especially when one considers the small size of the CDN workforce. In 2001, the CDN paid Burke consultants at least $221,737, with Larry Wong alone receiving $132,150 for his services. In 2002, the CDN paid Wong at least a further $83,900, according to records filed with the Department of Labor (DOL).[37] However, the true cost of the campaign is likely to be much higher if one includes other costs, including management's and supervisors' time off to meet with consultants and to conduct captive group and one-on-one meetings with employees, employee time off to attend captive meetings, and the cost of legal counsel—a vital service considering the number ULP complaints in the campaign. Thus, the total cost of the antiworker campaign is likely to be several times higher than the $305,637 reported to date (the campaign is on-going) to the DOL.[38] At this rate, the CDN is well on its way to spending the $1 million it promised for its campaign to undermine the democratic choice of its employees. The average salary of CDN employees, most of whom are Taiwanese immigrants with approximately 10 years service, is $24,000. Over two years after they voted to unionize, CDN employees at Monterey Park are still without independent representation.

The second anniversary of the union "victory" brought further bad press for the newspaper. On March 19, 2003, Representative Sherrod Brown (D-OH) praised the "American struggle" of the CDN's immigrant employees in the official publication of the U.S. legislature, the Congressional Record. He commended their "tireless efforts as they continue to wrestle with the overwhelming resources of a foreign employer committed to silencing their voices and thwarting their right to organize under U.S. labor law . . ." Also, on the two-year anniversary of the vote, several CDN employees met with officials at NLRB Region 21 to insist that the board process their ULP complaints without further delay. The employees believed that a face-to-face meeting would stir the board to action. So far, however, neither the regional labor board nor the national NLRB has shown any signs of movement and have instead blamed the continuing delays on inadequate staffing levels and high caseloads. Claiming that it was "sensitive to the need to expeditiously resolve representation disputes," the NLRB recently established a goal of certifying the results of recognition elections within 60 days of the union's initial petition for an election.[39] The TNG–CWA petitioned for an election at the Chinese Daily News in November 2000—more than 1,000 days ago, as of November 2003.

The CDN campaign could well serve as a poster child for the dysfunctional nature of the contentious NLRB election system, and an advertisement for the democratic advantages of card check recognition.[40] It also demonstrates the often poisonous impact of anti-union consultants. The campaign at Monterey Park is striking in its contrast with simultaneous organizing drives at the newspaper's New York and San Francisco offices, where management ran a determined "vote no" campaign and hired a law firm to oppose unionization, but did not recruit the services of antiunion consultants. In significantly less acrimonious campaigns at New York and San Francisco, employees voted for union representation, and the company recognized the outcome. And the differences do not end with the election campaigns. Management is bargaining hard at both locations, but it is not attempting to circumvent employees' democratic choice through delays, retaliatory acts, legal maneuvering, and pronouncements that it would never recognize the union, let alone negotiate a

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[37] Consultant reporting forms required under the 1959 Labor-Management Reporting and Disclosure Act (LM20s and LM21s) are now available on-line at the Department of Labor's web pages: www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm.

[38] The Burke Group conducts its direct persuader activity under the name Labor Information Services, Inc. (LIS). This allows the firm to avoid reporting all other nonpersuader activity conducted under the name the Burke Group. The initial filing with the Department of Labor by LIS (LM 20, dated March 30, 2001) stated that its campaign at Chinese Daily News would commence on November 13, 2000 and that it had "no written agreement" with the company as to a "maximum billable amount."

[39] The NLRB claims that its "actual median time" from petition to certification was 54 days in 2001 and 53 days in 2002. National Labor Relations Board, Fiscal Year 2004 Annual Program Performance Plan and Fiscal Year 2002 Annual Performance Report, Government Performance and Results Act of 1993 (March 2003), pp. 18–19.

[40] In 2001, the AFL–CIO estimates, only 18 percent of new union members in AFL–CIO affiliated unions joined through NLRB elections. Most of the remaining 82 percent joined as a result of card check recognition, though some joined as a result of mergers between affiliated and nonaffiliated organizations, new affiliations and extension of existing collective agreements to newly expanded facilities. Jonathan Hiatt, General Counsel, AFL–CIO, comments at AFL–CIO Lawyers Conference, New Orleans, April 2003.

contract with it.[41] Whatever else distinguished the Monterey Park campaign from those in New York and San Francisco, there seems little doubt that the Burke Group's activities have played a central role in transforming a 95 percent display in favor of unionization into a destructive pitched battle designed to intimidate employees against exercising their right to form a union.

SUBVERTING WORKPLACE DEMOCRACY IN THE UNITED STATES

For the past three decades, consultants such as the Burke Group have been at the epicenter of a sustained and largely successful campaign to undermine workplace democracy in the United States. Consultants' antiunion campaigns are now more intensive, sophisticated, and expensive than at any time during the past half century. As a result, there now exists an enormous and growing democratic deficit in the American workplace: over 40 million private-sector employees would like union representation but are unlikely to get it under the current system of NLRB elections.[42] Through their web pages, newsletters, videos, and face-to-face contacts, consultants have also played an important role in the dissemination of extreme antiunion attitudes among American management, advising clients to fight organizing campaigns to the bitter end and to disregard their employees' desires for independent representation. Consultants encourage employers to view attempts by their employees to exercise their legal right to choose a union as an "attack on their company," and tell them that they have a right to operate union free.[43] They tell their clients to consider the representation process as a decision on unionization that is taken by them, rather than by their employees, thereby inverting the entire objective of federal labor policy.

In 2002, U.S. House member Charlie Norwood (R-GA) introduced a bill (H.R. 4636) designed to outlaw card certifications, thereby making NLRB elections the exclusive route to union certification.[44] The antiunion Labor Policy Association and other supporters of the Norwood bill claim that union organizers coerce and mislead unwitting employees into signing authorization cards. But the Chinese Daily News campaign provides a stark illustration of the real reason why a growing number of unions have turned to card certification: their desire to circumvent employers' lengthy, aggressive and illegal antiunion campaigns. Card check recognition is a vastly more democratic system than NLRB elections. According to one recent poll, the number of nonunion employees who desire union representation is currently higher than at any time since the early 1980s.[45] If Congress were serious about uphold ing the sanctity of what Representative Norwood called a "fundamental American right" (the free election) it could do worse than start by increasing the virtually nonexistent regulation of an industry that profits from the destruction of that right.[46] After that, it might turn its attention to the sclerotic and moribund system of union certification that has allowed the Chinese Daily News and countless other employers to break the law with impunity, thereby making a mockery of the democratic choice of their employees. The Bush Administration is keen to export democratic institutions throughout the globe. But how about a little bit more democracy in the American workplace?

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[41] The union has now successfully negotiated its first contract at the New York facility, where the paper is known as the World Journal. The New York and San Francisco units are substantially smaller than that at Monterey Park, and are composed exclusively of advertising-sales employees. At Monterey Park, the union represents a "wall-to-wall" unit covering all departments, from editorial to ad sales to production.

[42] Richard Freeman and Joel Rogers, What Workers Want (Cornell University Press, 1999).

[43] The Burke Group, www.tbglabor.com/press6.htm (May 5, 2003); Labor Relations Services, Inc. www.proemployer.net/about__labor__relations.htm (last visited May 5, 2003).

[44] The absurdly mistitled "Workers' Bill of Rights" was cosponsored by, among others, the Majority Leader in the House, Tom DeLay (R-Texas).

[45] David Hart Associates poll on union attitudes reported in Kent Hoover, "Labor unions aim to capitalize on public anti-corporate attitude," Houston Business Journal, September 9, 2002.

[46] In its first major policy action in the arena of labor-management relations, the Bush Department of Labor rescinded new financial reporting requirements for antiunion consultants enacted in the dying days of the Clinton Administration. Employer groups had lobbied vigorously against the Clinton rules, which narrowed the so-called "advice exemption" to the LMRDA, arguing that they would discourage employers from engaging the services of consultants and supply unions with a powerful organizing tool, i.e., more precise information on how much employers spend on antiunion activities.

APPENDIX: BURKE GROUP CAMPAIGNS COSTING OVER $40,000, 1995–2002

Employer	Location	Year	Reported cost [1]
Circus Circus	Robinsonville, MS	1995	$40,086
SAMCO	San Fernando, CA	1995	126,663
Reno Hilton Hotel	Reno, NV	1995	61,972
Tomatek, Inc.	Firebough, CA	1995	118,594
Weyerhaeuser	Yuma, AZ	1995	43,053
K-Mart Corporation	Troy, MI [2]	1996	163,028
Precision Castparts Corp.	Portland, OR	1996	63,436
TAWA Companies	Buena Park, CA	1996	44,928
C.J. Coakley	Merrifield, VA	1997	50,277
Grimmway Farms	Bakersfield, CA	1997	239,970
Precision Castparts Corp.	Portland, OR	1997	395,626
MCI	Washington, DC	1997	56,406
Reno Hilton Hotel	Reno, NV	1997	88,163
Welcome Market, Inc	Hayward, CA	1997	69,981
President Casino	St. Louis, MO	1997	45,237
Relay America	Riverbank, CA	1997	65,052
Catholic Healthcare West	Sacramento/LA, CA	1998	2,626,514
C.J. Coakley	Merrifield, VA	1998	64,325
Mercy Healthcare	Phoenix, AZ	1998	196,791
Ready Pac	Irwindale, CA	1998	143,174
Reno Hilton Hotel	Reno, NV	1998	351,995
Service Corp. International	Houston, TX	1998	154,896
Mercy Healthcare	Whittier, CA	1998	42,521
UCSF Stanford	San Francisco/Palo Alto, CA	1998	115, 625
K-Mart Corporation	Troy, MI [2]	1999	416,305
Long Beach Medical Center	Long Beach, CA	1999	48,133
Reno Hilton Hotel	Reno, NV	1999	109,440
Warsaw Healthcare Center	Warsaw, VA	1999	52,747
PECO Energy	Philadelphia, PA	1999	51,187
CPL Subacute, LLC	Middletown, CT	2000	47,201
Children's Hospital	San Diego, CA	2000	43,204
Santa Barbara Cottage Hospital	Santa Barbara, CA	2000	99,445
Enloe Medical Center	Chico, CA	2000	76,011
Francis Schervier Hospital	Bronx, NY	2000	126,138
Good Samaritan Hospital	Los Angeles, CA	2000	131,145
Grove Worldwide	Shady Grove, PA	2000	98,604
Long Beach Medical Center	Long Beach, CA	2000	235,985
Somers Manor Nursing Home	Somers, NY	2000	50,000
Distribution and Auto Services	Wilmington, CA	2001	47,153
Bruce Hardware Floors	Addison, TX	2001	48,836
CHE—Mercy Fitzgerald Hospital	Darby, PA	2001	79,911
CHE—Holy Cross Hospital	Fort Lauderdale, FL	2001	65,396
Chinese Daily News	Monterey Park, CA	2001	221,737
Albert Einstein Medical Center	Philadelphia, PA	2001	102,142
Arden Hill Hospital	Goshen, NY	2001	74, 401
Constellation Energy (BGE)	Baltimore, MD	2001	252,036
BHC—Pacific Gateway	Portland, OR	2001	42,117
Jefferson Market	New York City, NY	2001	45,750
JLG, Inc.	Mechanicsburg, PA	2001	58,902
Kmart Corporation—Canton	Troy, MI	2001	167,301
Magee Rehabilitation	Philadelphia, PA	2001	95,906
Mandalay Bay—Luxor	Las Vegas, NV	2001	76,860
Robert Wilson, Sr.	Anaheim, CA	2001	53,829
Columbia Beverage Co.	Olympia, WA	2001	81,629
Excalibur Hotel	Las Vegas, NV	2001	69,923
Peak Oil	Anchorage, AK	2001	50,618
Terra Industries	Sergeants Bluff, IA	2001	57,639
Universal Molding Extrusion	Downey, CA	2001	74,386
Wilkes-Barre General Hospital	Wilkes-Barre, PA	2001	75,101
CHE—Brightside F & C	West Springfield, MA	2001	73,003
Rockaway Bedding	Randolph, NJ	2001	49,044
Orange County Register	Santa Ana, CA	2001	176,314
CHE—Lourdes (Rancocas)	Camden, NJ	2002	109,675

APPENDIX: BURKE GROUP CAMPAIGNS COSTING OVER $40,000, 1995–2002—Continued

Employer	Location	Year	Reported cost [1]
CHE—Mercy Fitzgerald	Darby, PA	2002	52,901
Faurecia	Toledo, OH	2002	134,306
Magee Rehabilitation	Philadelphia, PA	2002	80,087
Michael Anthony Jewelers	Mt. Vernon, NY	2002	57,693
Milestone Power Station	Waterford, CT	2002	728,148
Mission Linen Supply	Santa Barbara, CA	2002	117,438
National Refrigeration & Air Conditioning, Inc.	Bensalem, PA	2002	52,866 88
Chinese Daily News	Monterey Park, CA	2002	83,900
Orange County Register	Santa Ana, CA	2002	94,817
Robert Wood University Hospital	New Brunswick, NJ	2002	47,845
St. Mary's Medical Center	Apple Valley, CA	2002	62,876

[1] Note.—These amoiunts are taken from LM20 and LM21 forms (Receipts and Disbursement Reports) filed by Burke Group (under the name, Labor Information Services, Inc.) with the Department of Labor, required under the 1959 LMRDA. Campaigns that did not involve direct persuader activities are not reported and thus not listed. In the case of Catholic Healthcare West, the amount reportedly paid to the Burke Group ($2,626,514) is taken from Schedule A (Form 990) [Organization Exempt Under Section 501©(3)] filed by the employer (a financial report required by nonprofit healthcare organizations). As a result, unlike the other reported costs, that amount is likely to accurately represent the total cost of the consultant campaign.

[2] Troy, Michigan is the location of the K-Mart's corporate headquarters. The actual counterorganizing activity at K-Mart was carried out at several different locations across the country, including Oakland and San Jose, California. Several other locations may also refer to the corporate HQ rather than the location of the counter-organizing campaign.

Ms. CONNELLY. The union actually won that election by a very small vote. We do have a contract there. But they did a lot of what was described in this situation, although not quite as long. There was a stipulation to an election, so we didn't have to go through a lot of delay with the Labor Board, but in the 2 months, 2½ months up to the election, they did a lot of one-on-one meetings inside. They'd actually bring somebody in and hire them so that they lived inside the hospital for a while, and a lot of literature. And we beat them and I actually went and bargained that first contract.

So what the Attorney General found—the reports don't come out—and some of this is described in the additional material on Burke that I submitted. The reports, of course, don't come out until 1 year or 2 later in terms of what is being spent on these kind of union, anti-union campaigns, and there's even different filings you have to look at, whether it's an L&Q from the hospital or the 990 from the company, you have to put it all together.

I think in that campaign with SEIU, they spent like a quarter of a million dollars, which is Medicare/Medicaid money, health care dollars which was spent. And that's what Attorney General Casey found, that the moneys were being spent illegally to fight the union. But nothing was ever done, because there was really no penalty. I can get you additional information on that if you want.

Senator SPECTER. Did you make complaints about that to the NLRB?

Ms. CONNELLY. On the use of dollars?

Senator SPECTER. On the coercive tactics which you've described, the union busting and the intimidation. Do you get a hearing from the NLRB or any results when unfair labor practices are shown?

Ms. CONNELLY. I don't believe that we filed objections. If it happens after the election, we would file objections to the election. Oftentimes we file charges leading up to the election. We've filed so many of those, I lose count. And a lot of times we will file objections to an election if we lose the election.

Then I mean I was in a situation, this is back in the mid 1980s, it was against Beverly Enterprises, we lost the first election, filed

objections, went back 6 months—because the Board ordered a new election, went back 6 months later. We won that election. No, we won the first one, the employer filed objections, we lost the second one. And then the third one we finally won.

It took like 3 years just going through elections before we actually got the union. They still have the union there today. But we constantly file objections and charges and most often they're upheld.

Senator SPECTER. Mr. Cohen, as a former member of the NLRB, listening to allegations and evidence on both sides, how would you recommend sorting out the testimony we've heard today where Ms. Atherholt specifies multiple visits, signing cards to, as she put it, get rid of a person, contrasted with what Ms. Brockel testifies to coercive tactics, and you heard Ms. Ruckinger testify about her own discipline.

I'm not inexperienced in evidentiary hearings, listening to conflicting testimony, but how would you recommend sorting it out?

Mr. COHEN. Well, without having personal knowledge, of course, of any of those situations——

Senator SPECTER. I don't, either. I'm just listening to testimony. But firsthand personal experience, this is all concrete evidence. It's not hearsay. This is what people have been through, but it's on both sides.

Mr. COHEN. Sure. What came through to me would be to recognize that coercive conduct either by employers or by unions is prohibited under extant law. And undoubtedly there are circumstances where union coercion occurs, there are instances where employer coercion occurs. The NLRB has mechanisms. Both Ms. Fox and I and Mr. Higgins passed on hundreds of cases during our tenures as Board members.

Senator SPECTER. Yes, but you're not there now and things have slowed up since you left.

Mr. COHEN. Let's analyze that for a moment, if we can. With respect to representation cases, Mr. Higgins said that the median time is 40 days to an election, and that is an accurate figure from everything that I know. And the reason for that is that over 90 percent of the time employers stipulate to the holding of an election, and they cannot get more than 42 days for the holding of that election. That takes care of the great overwhelming majority.

The remaining less than 10 percent go to hearing. That adds more time. But it still provides the 56 day median overall with respect to 90 percent of the elections. Where the problem can come in is on those cases where the Board actually grants review—it's like a certiorari proceeding. Where the Board actually grants review, it can take a great deal of time to actually get that decision out.

As Mr. Higgins noted, the Board has not been at full strength for the overwhelming majority of time. They've been plagued by recess appointments and being short-staffed at the top decision-making level. And to be sure, that should be corrected.

With respect to unfair labor practice cases, the Board investigates those, they prioritize them, they have a triage system. The serious and significant ones and those involving union organizing situations go to the top of the pile. They do, in my judgment, an

excellent job of investigating those cases and taking action to issue a complaint or not issue a complaint and then go to a hearing before an administrative law judge. So I think the system is already in place which deals with the overwhelming majority of the cases.

Senator SPECTER. Ms. Fox, you testified that in 1996, there was a shift in procedures where, as I think you put it, the employers insisted on elections.

Ms. FOX. It was actually 1966, Senator.

Senator SPECTER. 1966. But prior to that time, the practice had been for employers to accept evidence that was put on cards or other evidence without the insistence on elections?

Ms. FOX. Right. Employers still today can accept evidence on a card as a basis for recognizing a union, but prior to 1966, they were required to unless they had a good faith doubt that they were, in fact, valid expressions of employee sentiment.

Senator SPECTER. So it was not a shift in position by employers, it was a shift in the law?

Ms. FOX. A shift in the law brought about by changes by the Board, not by a Congressional change.

Senator SPECTER. Not by statute, by the Board?

Ms. FOX. By the Board, yes.

Senator SPECTER. The Board handed that down as a Board ruling?

Ms. FOX. Yes.

Senator SPECTER. Well, I was impressed with what you said, especially about withdrawal by a majority on the petitions, that you can't get a certification of the union by a majority, but you can get a withdrawal by a majority on the petition. Is that your understanding as well, Mr. Cohen?

Mr. COHEN. The situation is, unfortunately, a little bit more complicated than that. For 50 years the law had been that an employer could withdraw recognition based on a good faith doubt of majority status.

That was changed within the last 5 years to require actual loss of majority status. So that under extant law, if an employer has actual knowledge of loss of majority status, it may withdraw recognition without an election. And I think it's particularly interesting to note that——

Senator SPECTER. Well, how do they determine the actual loss?

Ms. FOX. By signatures on a petition.

Mr. COHEN. Which can be subject to a litigated proceeding, an evidentiary proceeding to see if the employer is wrong.

Senator SPECTER. But if they aren't, they can have a withdrawal, which is the equivalent of a card withdrawal?

Mr. COHEN. That is correct. I think it's particularly interesting to note that in that very case the AFL–CIO filed a brief saying that the only effective barometer of employee support should be a Board secret ballot election. And I find it very difficult to square that position with the advocacy for the subject legislation.

Senator SPECTER. Well, can you square the position on permitting withdrawal on cards without an election whereas you won't allow certification unless there's an election?

Mr. COHEN. I can, and it's important to understand the timing of it. When a union comes in and reaches a collective bargaining

agreement, there is a document known as the contract bar doctrine which for 3 years bars any attempt at decertification or withdrawal of recognition by the employees during that period of time.

There is a limited window between 60 and 90 days before the contract expires and then if the contract expires without being renewed where the employees can express this desire to disaffiliate from the union relationship. And in that limited context, the employee wishes can be honored without an election.

Senator SPECTER. I think we're at a substantial disadvantage in the Senate, not having any former NLRB members. I think we're going to have to elect some of you folks to the Senate, maybe even from New Jersey, to move ahead.

Ms. CONNELLY. No, thank you.

Senator SPECTER. I'm going to blame it on you, Eileen, when I talk to Lautenberg.

Mr. Taubman, you've painted a little different picture. You're having a plague on both their houses. Here you have the employers and employees get together to engage in coercive tactics against individuals who don't want to join the union and they're being put upon on both sides. What would you recommend as giving fairness to your clientele?

Mr. TAUBMAN. Well, what I would say is I agree with Mr. Cohen's point that the law has remedies for coercive conduct, whether it's employer coercive conduct or union coercive conduct, and I'm not here to defend any of that.

My point today is none of this is solved by taking away the secret ballot, by mandating that there can be no secret ballots, because it is just fundamentally unfair and unAmerican and to not get dramatic, we have troops fighting all over the world to spread American values and I find it unbelievable to think that we have to defend the notion of secret ballot election in the United States.

Senator SPECTER. Ms. Atherholt, did any of those folks come to your house four times to——

Ms. ATHERHOLT. No, they did not, for the simple fact that they knew exactly where I stood with them right from day one. They were standing at the end of our driveways as we went into work, and after I got some fliers made up like they had fliers made up, I just stood right out there with them and passed mine out, too.

Senator SPECTER. So it is possible for someone in your position to be sufficiently resolute and give off the signs that nobody's going to annoy you?

Ms. ATHERHOLT. That is correct.

Senator SPECTER. Is it your visor that gives you strength?

Ms. ATHERHOLT. Well, I don't know. It's just kind of become my trademark, I guess. I've worn it for years.

Senator SPECTER. Ms. Brockel, you had mentioned that charges were filed with the NLRB. How did all that work out?

Ms. BROCKEL. The charges were all filed. The charges were justified charges and they were presented.

Senator SPECTER. Did the N LRB uphold them?

Ms. BROCKEL. They allowed us to file the charges.

Senator SPECTER. Did they?

Ms. BROCKEL. Yes, they did. They were substantiated.

Senator SPECTER. Ms. Ruckinger, I want to again tell you that if anybody disciplines you for coming to this hearing, you contact me.

Ms. RUCKINGER. Thank you.

Senator SPECTER. People have a right to speak up in our society without fear of intimidation on any side.

Ms. RUCKINGER. Thank you.

Senator SPECTER. You can't discharge someone or discipline someone for exercising First Amendment rights, you cannot do that. A Senator may be in a position to help you out.

Ms. RUCKINGER. Thank you, Senator.

Senator SPECTER. This is a very complex subject, ladies and gentlemen, as we see, and we will be studying the testimony very closely. It seems to me that it requires a lot of expertise and we intend to spend the time to make a determination. I talked about these hearings with a number of my colleagues and there's a lot of interest in this subject.

We could go on and explore this at some additional considerable length. We had to restrict the hearing today, because my chief of staff passed away on Wednesday. Carey Lackman Slease. And we had to delay the hearing by an hour, as you know, at the beginning of the meeting, but I did not want to postpone the hearing. These are issues we're taking up. We go out of session at the end of next week and I would not be able to reschedule until sometime in the fall and I wanted to have the hearing. So we postponed it for the hour, and because we squeezed the schedule, we can't go on now.

I think we have the essence of it, and it's not easy. These are evidentiary matters. We'll take a look at the formal statements which have been filed and we may well call on you for additional comments. We appreciate your coming and providing the testimony.

This is a better attended hearing than any we have in the United States Senate ordinarily unless we have a celebrity. If Michael J. Fox comes in, we have a lot of people. If Elizabeth Taylor comes in, we have a lot of people. But if just Senator Specter comes in, it's usually very sparse.

PREPARED STATEMENT RECEIVED

We have received the prepared statement of the United Food and Commercial Workers Local 1776 which will be placed in the record.

[The statement follows:]

PREPARED STATEMENT OF THE UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1776

The Employee Free Choice Act, S 1925 is, without exaggeration, one of the most important pieces of legislation to labor to be introduced since the National Labor Relations Act (NLRA) itself.

For years, the Labor Movement in the United States has been losing membership. This is a trend that continues despite nearly every AFL–CIO Labor Union turning its focus to Organizing the Unorganized. Tremendous resources, time, staff and financial, have been poured into Organizing departments across the nation.

Our experience, at United Food and Commercial Workers (UFCW) Local 1776 is very typical of what we face today. In just about every Union election, employers have broken the law, almost without sanction. For a case and point, Local 1776's efforts to organize Sunoco mini-market workers in Philadelphia can be examined.

Prior to the election date of (DATE), the employer issued repeated threats to close particular locations, directly in violation of the NLRA. When these threats were not

enough, the company would conduct polling activities after repeated captive-audience and one-on-ones with management. They repeatedly threatened to fire workers who expressed positive feelings towards Unionization.

Finally, on the date of the election, despite clear language in the NLRA, managers for Sunoco mini-marts were standing outside the polling places and asking workers how they voted.

This says nothing about Wal-Mart, the largest employer in Pennsylvania, the United States and in the world. Their anti-Union tactics are both ruthless and legendary. Articles too numerous to mention have discussed their illegal efforts to remain union-free. Workers are fired under the lamest pretenses for working with, even for being seen with Union Organizers. Workers are kept under constant threat of discipline if they are seen talking, even with other co-workers. The Wal-Mart managers manual has a special number for store managers to call if they even think that a Union is in their store.

We are sure that other individuals have testified about some of these difficulties bringing new members into the Union. We will be happy to amplify and add to this testimony at any time.

The usual recourse for all these illegal actions and tactics is to file charges with the National Labor Relations Board (NLRB). The NLRB is made up of political appointees, generally from the ranks of anti-Union law firms, with little or no representation from Organized Labor. How can a board rule and pass judgment on the actions of Labor, without someone from Labor there to help explain things?

The Employee Free Choice Act (S. 1925) is simplicity in itself. It simply says that if a Union gets more than half of the workers in a potential bargaining unit to sign cards authorizing the Union to be their sole representative for collective bargaining, then that unit becomes part of the Union.

The Employee Free Choice Act further puts serious punishments for violations of the NLRA and enforces a time-frame for bargaining a first contract. As the law currently stands, the punishments for illegally firing pro-union workers are so light that it's worthwhile for employers to do so. The amount of time that it takes to get a hearing before the NLRB and have them determine an illegal firing almost guarantees that the employee will not be reinstated until after a Union election takes place.

Because the penalties for these illegal firings and illegal tactics are so minor, companies violate them with impunity. The combination of all these illegal actions shows employees that the company will do whatever it takes to keep a Union out, and makes it even more difficult, in most cases, to win a second attempt at a Union election.

In conjunction with the "card-check" and first contract provisions in the Employee Free Choice Act, there are sections that institute real penalties for violating the National Labor Relations Act.

The middle class in the United States was built by Union members. Many benefits that an average worker, with or without a union in their workplace, takes for granted are benefits that people in the labor movement have fought, and sometimes died, to win for all.

The absolute worst thing that can happen to the United States is for us to lose that middle class, and the labor unions that built it.

The United States has about 13 percent of its workforce as members of labor unions. The vast majority of those workers earn a living wage, and have some benefits, including some form of health coverage, vacations and other benefits that strengthen individual families. In Canada, which had a structure for organizing similar to that under the Employee Free Choice Act, 35 percent of the workforce is unionized.

A study by Kate Bronfenbrenner, Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing, showed some shocking statistics. There are as many as 42 million workers in the United States who say that they want to belong to a Union. Since Unions are out organizing all the time, and currently only have about 12 percent of the workforce as members, the reason for the disparity must be the unfairness of the NLRB election process. About 47 percent of the workforce would join a union if there were no interference in that decisionmaking process.

In the retail food industry, Local 1776's core, union workers make, on average, 33 percent more than non-Union workers. When comparisons are made directly between this Local and workers at big box retail stores, the differences are even more dramatic.

An average retail food member of Local 1776 earns about $12 an hour. An average worker at a big box store earns $8. The benefits that this local offers are second to none in the nation. Our members have earned their health coverage, including

dental, vision, mental health care and several other health benefits. They have earned their pensions, after years of contributions. They have earned the award-winning education benefit, the child care benefit, and everything else that is negotiated in their contracts.

Please, I urge you to allow other workers to be able to enjoy the fruits of their hard work, while having the benefits of a legally-binding contract. Become a co-sponsor of S. 1925, the Employee Free Choice Act, and, once again, demonstrate your strength and your care for working families.

Thank you for your attention to this vital bill, and to our thoughts on it.

CONCLUSION OF HEARING

Senator SPECTER. Thank you all very much for being here. That concludes our hearing.

[Whereupon, at 3:20 p.m., Friday, July 16, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

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